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There have lately been brought to our attention many gratifying evidences of the practical value of the CENTRAL LAW JOURNAL in the preparation of briefs, and as assistance in the settlement of difficult or controverted questions of law. In our desire to increase the value of the JOURNAL in this direction we have made it a practice in many cases to treat by special article, or editorially, questions of peculiar difficulty, or of great practical value, which have been submitted to us by our subscribers and correspondents, and which are in actual litigation. In order to avoid, however, any misunderstanding in regard to this matter, we desire to make two statements: first, that while we appreciate very highly the receipt of these queries, we cannot, of course, attempt to consider them all, or even to acknowledge them all by publication in the JOURNAL; second, that we never permit any presumption in favor of that side of the query in which our correspondent may be personally interested to bias us in our consideration of the legal questions involved. Such questions are considered merely as abstract propositions of law, and the attempt made to collect all the authorities and to state the correct rule on principle. With this understanding we are inclined to encourage the sending of such queries. They are of undoubted assistance in determining the subject-matter of articles and editorials that may appear from time to time in the columns of the CENTRAL LAW JOURNAL.

ORIGINAL ENTRIES IN BOOKS OF ACCOUNT AS EVIDENCE.

The rules of evidence are more than any other of the rules of law subject to the fluctuations of usage and custom in trade and commerce. As a striking evidence of this is a portion of the court's opinion in the recent case of Harmon v. Decker, 68 Pac. Rep. 11, where it was held that amounts charged in a decedent's accounts to defendant, to cash advanced to, and checks in favor of, other persons, should be excluded, the entries not showing that they were for moneys loaned defendant or furnished others on his orders. In considering what would have been the rule, even if the items had correctly identified themselves, the court enters into an interesting review of the growth of the law on the admissibility in evidence of original entries in books of account. The court said:

"It was the rule of the common law that entries made in the regular course of business by a clerk in the shop books were admissible in evidence after the death of such clerk, on proof of his handwriting. Welsh v. Barrett, 15 Mass, 380; Walker v. Curtis, 116 Mass. 98. The rule was first extended in the United States to cases in which the person making the entry is still living, and verifies the memoranda, though he may not remember the facts so entered; but such entries are not admissible in the lifetime of the clerk, unless they would be admissible after his death, upon proof of his handwriting Spann v. Baltzell, 46 Am. Dec. 346. The rule was further expanded in this country so as to admit in evidence entries made by the parties themselves, as well as those made by their clerks, to prove the price of goods, the sale or delivery thereof or the performance of work or labor. Bank v. Knapp, 15 Am. Dec. 181; Merrill v. Railroad Co., 30 Am. Dec. 130. In Bracken v. Dillon, 64 Ga. 243, 37 Am. Rep. 70, it was held that, before the books of a merchant or other tradesman can be used to prove an account, it must appear that he has no higher evidence of its truth, and therefore that he had no clerk who sold the goods, or that the the clerk, if he had one, is dead, beyond the jurisdiction or otherwise inaccessible; if he had no clerk who sold the goods, or the clerk is inaccessible, then, before he can introduce the books, the bookkeeper, if accessible, must be produced to prove that it is the book of original entries; if he had none, or he is inaccessible, then he may prove that it is the book of original entries himself; books are secondary evidence, and only admissible *ex necessitate rei;* that the books will not establish considerable items for cash, nor accounts of third persons transferred to defendants, nor are they admissible at all to show an authority to make such transfer."

One of the peculiar phases of this question is, however, that while books of original entry are admissible to prove the price, sale, and delivery of articles, and the performance of labor or the rendition of services, because

such are made in the usual course of business, such books are generally inadmissible to prove the loan of large sums of money, because transactions of this character are usually evidenced by promissory notes, checks and bills of exchange. Veiths v. Hagge, 8 Iowa, 163; Winner v. Bauman, 28 Wis. 563; Kelton v. Hill, 58 Me. 114; Lyman v. Bechtel, 55 Iowa, 437; Lehman v. Rothbarth, 111 Ill. 185; Culver v. Marks, 122 Ind. 554, 23 N. E. Rep. 1086, 17 Am. St. Rep. 377. In the case of Veiths v. Hagge, *supra*, the court charged the the jury that "cash, except in small items, is not the subject of book account, and cannot be proved by books alone." Mr. Justice Stockton, speaking for the court on appeal, said: "We think the general rule is clearly established that a charge for 'money paid' or 'money lent' cannot be proved by the party's books of account; such transactions are not usually the subject of a charge on account." In the late case of Furniture Co. v. Mason, 3 S. Dak. 147, 52 N. W. Rep. 671, this doctrine is slightly modified, and it was held that while the loan of large sums of money is usually evidenced in the manner indicated, these items may be proved by the books of a banker or broker, when such is in pursuance of his ordinary business methods.

In speaking of this last distinction as to items of "money paid" or "money loaned" the court in the principal case said: "What shall be considered as a large sum of money, the loan of which cannot be established by the mere production of books of account, will probably ever remain problematical. The growth of commercial interprise must necessarily expand the methods of transacting the business pertaining thereto, including the mode of evidencing such facts, and as courts are not called upon to make, but to enforce, the rules adopted by experience, it would seem to follow that what, a few years ago, would have been regarded as a large sum of money, must now be considered as a mere bagatelle, so that the standards as formerly fixed cannot longer remain as guides of procedure."

NOTES OF IMPORTANT DECISIONS.

SCHOOLS AND SCHOOL DISTRICTS — REASONABLENESS OF PUBLIC SCHOOL REGULATION PROHIBITING THE ATTENDANCE OF CHILDREN OF CERTAIN AGES.—It has been said that the children of the present age are more precocious than children of former times. It was the common practice years ago never to learn a child its alphabet before it was five or six; now it is no uncommon sight to find children who can read at that age. In the effort to discourage parents and guardians of children from pushing the mental activity or their children in advance of their physical growth and also to grade the school properly, school trustees have endeavored to enforce regulations preventing the attendance at the public schools of children of certain ages except at certain times. In this they have generally been sustained by the courts. Thus, in the recent case of Alvord v. Inhabitants of Town of Chester, 61 N. E. Rep. 263, the Supreme Court of Massachusetts held that a school committee's regulation that children under the age of 7 years shall not attend school unless they enter at the beginning of the fall term, or within four weeks thereafter, or unless they are qualified to enter classes existing at the time of their entry, is a reasonable regulation, and valid, under a statute, allowing, but not compelling, children under 7 to attend school, and making the right of children to attend the public schools subject to reasonable regulations at to the numbers and qualifications of pupils to be admitted. Just the opposite conclusion was reached by the court in the case of Board of Education v. Bolton, 85 Ill. App. 92, where it was held that a rule prohibiting children who have just arrived at school age from entering the schools at any time except during the first month of the fall and spring terms is not reasonable or calculated to promote the object of the law.

ADULTERATION — LIABILITY FOR SELLING COW'S MILK NOT UP TO STANDARD BUT WHICH HAS NOT BEEN ADULTERATED.—When a farmer sells milk exactly as it was yielded by the cow, it must be very hard for him to understand how he can possibly be guilty under the laws against adulteration. And if, under such circumstances, he is prosecuted and convicted, he will doubtless have a great deal of sympathy in so apparently preposterous a situation. In the case of Smithies v. Bridge a divisional court heard an appeal from quarter sessions by a farmer who had been convicted in exactly these circumstances. It was proved that the milk had been sold as given by the cow, but that it was deficient in fat according to the board of trade standard. The extraordinarily poor quality of the milk was explained by improper milking arrangement. The farmer was prosecuted and convicted for selling to the prejudice of the purchaser milk not of the nature and quality demanded. Against this conviction he appealed, and he succeeded in dividing the court and getting some sympathy, although he did not succeed in getting his conviction quashed or in persuading the majority of the court. Nor it is clear that the board of trade standard does not supply conclusive evidence as to purity. It only provides *prima facie* evidence, which certainly may in some cases be rebutted. Here, however, the purchaser who demanded new milk was justi-

fied in expecting to receive milk that was not so deficient in fat as to be incapable of being described as new milk. This was what he did receive. It seems clear, therefore, that he received milk not of the nature and quality he demanded, and that he was prejudiced. Hence, as it is well established that no guilty knowledge need be proved in a charge under section 6, the seller of the milk apparently brought himself within that section, and so a majority of the court held. If the seller of the milk were absolutely free from all blame in the matter, sympathy for him would probably be undiluted. It was proved, however, that the improper milking arrangements were the cause of the condition of the milk, and that he ought to have known that the arrangements were improper. This does not imply any moral guilt, and so the farmer may consider that he is a victim of one of the rare exceptions to the rule of law that *mens rea* must be proved to convict of any offense. Although in this case the defense was no doubt *bona fide*, still the result is fortunate; for such a defense might easily be set up fraudulently, and might often succeed, if the opinion of the minority of the court had prevailed.—*Solicitor's Journal.*

CIVIL SERVICE—WHAT OFFICES COME WITHIN THE OPERATION OF THE SYSTEM AND MAY BE CLASSIFIED.—The civil service propaganda is rapidly extending the benefits of its excellent system into both state and municipal governments. The results as evidenced by the decided cases are exceedingly favorable, the courts as a general rule upholding and enforcing the provisions of the law with a firm hand. Thus, in the recent case of City of Chicago v. Luthardt, 61 N. E. Rep. 410, the civil service act of Illinois empowered the commissioners to classify all the offices and places of employment in a certain city, except those elected by the people, and provides that such offices and places shall constitute the classified civil service of the city. Section 4 authorizes the commissioners to make rules for carrying out the purposes of the act. The commissioners adopted rules and classified the offices and places into the official and labor service. The chief clerk of the detective bureau was classified as a member of the official service. The question before the Supreme Court of Illinois in this case was whether such chief clerk was a municipal officer or a city employee, within the meaning of the act. The court held him to be a municipal officer and entitled to all the benefits of the civil service act, one of which was the right to recover his salary for the period he was discharged and prevented from performing the duties of his office. The court said in part:

"Appellant claims that the appellee is an employee, and not an officer, of the city of Chicago, and for that reason is not entitled to any compensation, as he did not perform the services he was employed to perform. The duties of appellee's office or position were as follows: To receive all letters and telegrams received by or referred to the chief of detectives relative to police business, number and index the same, and see that proper reports are made thereon, and that they are answered and filed, or otherwise disposed of, as may be directed; to prepare and send out all letters and telegrams issued from the detective bureau; to make out fugitive warrants, and prepare requisitions for extradition of fugitives from justice wanted by the Chicago police department; to see that the books and records of the detective bureau are properly made out and kept, and to prepare and make such reports as may be required. Numerous cases and authorities are cited by appellant, which, it is claimed, establish that, because appellee's duties were purely of a clerical character, his position was that of a mere employee of the city, and not an officer. Conceding that under the test of these authorities the position of appellee was not that of an officer in the strict sense, we think they are not applicable in the case at bar. In the case of People v. Loeffler, 175 Ill. 585, 51 N. E. Rep. 785, in which the supreme court had under consideration the question as to whether the positions covered by the civil service act were offices, within the meaning of section 24, art. 5, of the constitution, it was held that the offices or positions provided for under the civil service act, while not strictly offices, within the meaning of the constitutional provision, were in a sense municipal offices. The court say: 'Inasmuch as the definition of "office" in section 24 refers to state, and not to municipal, offices, there is no provision in the constitution prescribing any particular mode for the appointment of officers in municipal corporations. The legislature therefore may provide for the appointment of officers in the municipal government in the mode adopted by the civil service act. In the absence of any constitutional restriction, the power of the legislature is ample to provide the mode of appointment to be adopted in selecting municipal officers.'"

As evidencing the tendency of the courts to give every possible impetus and advantage to the enforcement of the civil service act, the later cases are interesting. Thus, in the case of Attorney General v. Trehy (Mass. 1901), 59 N. E. Rep. 659, the charter of the city of Chicopee required the office of almoner of the poor house to be appointed by the overseers of the poor. The civil service act excepted from the operation of the system all elective or judicial offices and those whose appointment were subject to confirmation. In the controversy that ensued between the board of civil service examiners and the board of overseers, the court held that the office of almoner came within the authority of the civil service commission and no other appointment was valid. On the other hand it was held that a county detective, appointed by the district attorney and required to perform such duties as may be assigned to him by such attorney, is a "confidential" position, within the section of the civil service act excepting such positions from its operation. People v. Clarke,

66 N. Y. S. 1068. The question whether the applicant or contestant for a certain office of a certain class belongs to the competitive class is a question of law to be determined by the court. People v. Knox, 61 N. Y. S. 469. In the case of People v. Henry, 62 N. Y. S. 102, it was held that the rules of the civil service commission prohibiting the dismissal of public officers and employees, without cause, did not apply to an office the duration of which is not provided for by law, since, under the constitution, such offices can only be held during the pleasure of the appointing authority. In the case of City of New Orleans v. Board of Fire Comrs. (La. 1898), 23 South. Rep. 906, it was held that the position of secretary-treasurer of the board was not included within the scope of the act placing under civil service all appointments "in the fire force" and hence, the fire board has authority to appoint one to fill said position, independently of the civil service. It is also the rule that if the office under consideration has not been classified by the commission, its appointees are not entitled to the benefits of the service rules. *In re* Agar, 47 N. Y. S. 477.

LIABILITY OF PARENT AT COMMON LAW ON CHARGE OF MANSLAUGHTER FOR NEGLIGENTLY OMITTING TO FURNISH MEDICAL ATTENDANCE TO CHILD BECAUSE OF RELIGIOUS DISBELIEF IN THE EFFICACY OF MEDICINE.

This question, circumscribed though it is, divides itself into several distinct propositions. First, is religious belief a defense for the failure to perform a legal duty? Second, is there such a legal duty resting upon the parent to furnish necessaries to his child? Third, is medical attendance, at common law such a necessity?

Taking these questions in the order named, How far, if at all, is religious belief a defense to the performing of an illegal act, or the omission to perform a legal duty? It is admitted that under the laws of the various states an individual is entitled to the free exercise and enjoyment of religious profession and worship without discrimination or preference, and the constitutions of the various states provide, as does that of our own,[1] that no person shall be denied any civil or political rights, privilege or capacity on account of his religious opinion. It is only when religious convictions become crystallized in acts or omissions, and such acts or omissions are contrary to law, that the questions now under consideration presents itself. Numerous decisions have been handed down by our courts upon this subject, and, so far as we have been able to find, in every case where the question has been squarely presented, the courts have said that a person is not excused from doing an act which a state can and does prohibit under its criminal or police powers, simply because the doing of the act is a part of the offender's religious belief. Thus, in the oft-cited case of Reynolds v. United States, 98 U. S. 145, the defendant attempted to defend a charge of bigamy under the plea that he was a Mormon, and that, under the religious tenets of the Mormon church, bigamy was not a crime. The court, however, held "that religious belief cannot be accepted as a justification of an overt act made criminal by the law." To the same effect are other decisions noted below, which time forbids me to present.[2] If religious belief is no excuse for the performance of an illegal act, no logical reason appears why it should be such for the omission to perform a legal duty, and that such is not the case is decided in the case of Regina v. Downes, 13 Cox, Criminal Cases, page 111. In that a statute has provided that it was an offense for a parent willfully to neglect to furnish medical aid, among other things, to a child. The defendant offered his religious belief as an excuse for an omission to perform his duty, but the court held "that where a legal duty existed, a religious belief was no excuse for an omission to perform that duty." The essential thing is, therefore, the existence of a legal duty. Whether that duty arises by virtue of an express statute or by the common law would seem necessarily to be unimportant. In Queen v. MacKekequonak, reported in 2 Canadian Criminal Cases, 138, the defendant attempted without avail to contend, that religious belief might be offered as a defense for the failure to perform a duty where that duty arose only under and by virtue of the common law.

Passing, then, to the second portion of our question, "Is a parent at common law under a legal obligation to furnish necessaries to his child?" Some cases will be found which apparently decide that while at common law the husband is bound to furnish necessaries to his wife, no such obligation rests upon him to furnish such to his children. These cases will, however, we believe, be found to be cases in which the question has arisen in a civil suit brought by a third person for necessities furnished by such third person to the child. Such civil liability resting upon the parent to reimburse third persons presents a very different question from that presented in a consideration of criminal liability of parents for a failure on their part to perform a duty. Blackstone, Volume 1, 446, referring to the duties of parents, says, "By begetting children they have entered into a voluntary obligation to endeavor so far as in them lies that the life which they have bestowed shall be supported and preserved." That such a legal duty rests upon the parent has been decided in numerous cases. Thus in the case of Regina v. Hook, 4 Cox, Criminal Cases, 490, the court held that a parent who has the means to

1 Constitution of Illinois, 1870, paragraph 3.

2 Haywood v. Haywood, 74 Tex. 414; *In re* King, 46 Fed. Rep. 811; Davis v. Beason, 133 U. S. 639; State v. White, 64 N. H. Rep. 48; Commonwealth v. Plaisted, 148 Mass. 375; *In re* Wong Hung Zey, 2 Fed. Rep. 624; Scales v. State, 47 Ark. 476.

supply necessaries but withholds the same with the willful determination to cause death, death resulting, is guilty of murder, and if the withholding is negligent, but not willful, the parent is guilty of manslaughter. And so in Regina v. Beer, a comparatively late case cited in Canada Law Journal, Volume 32, page 416, the court said: "It always was the law of England that the parent was bound to furnish necessaries to his infant child, and he was criminally responsible if he neglected that duty, if he was able to get the necessary provisions.[3] Not only is there abundant authority supporting this position, but so far as we have examined the cases we have found no decision holding that a parent is not so liable to furnish a certain thing providing that such thing is decided in a given case to be a necessity.

Is, then, medical attendance a necessity at common law? And by the term "medical attendance" we will accept the liberal view of the court in Corsi v. Maretzek,[4] in saying that medical attendance may be held to mean the attendance of any person who makes it his regular business to practice physics. There is, we admit, a confusion among the authorities upon this last branch of the subject. On the one hand we find several cases decided under the common law, and before any duty by virtue of any statute arose, apparently holding the affirmative of this proposition. As early as 1776, in 1 East Crown Cases, 226, the defendant, a master, was found guilty of manslaughter for neglecting to provide suitable care and medical attendance to a sick apprentice.[5] And so in Regina v. Smith, decided some sixty years later, Justice Patterson laid it down that "by the general law a master is bound to furnish his apprentice with proper medicine." In Regina v. Hurry, decided at the May session of the central criminal court, and reported in 76 Central Criminal Court Reports, vol. 76, page 63, a parent was indicted and convicted for neglecting to call in medical aid for a young child. In several other early cases the court seems *in dictum* to classify in a general way medical attendance with food, clothing, etc., as necessities. A careful search, such as our limited time has enabled us to make, has failed to reveal any decision in the United States in which in a criminal prosecution the question of medical attendance, as a necessity at common law, has been considered and decided. Numerous decisions in civil cases, however, have either expressly decided or recognized that such medical attendance may be a necessity."[6] Such would seem also to be the case from judicial interpretations of the term "necessity;" thus in Conant v. Burnham, 133 Mass. 504, the court says that "in a general way it may be said that whatever naturally and reasonably tends to relieve distress and materially and in some essential particular promote comfort either of body or of mind, may be deemed to be a necessary."

Apparently in opposition to these authorities are two early English cases, important because bearing upon the very point under discussion, Regina v. Wagstaffe, 10 Cox, Crim. Cases, 530, and Regina v. Hines (note in 13 Cox, Crim. Cases, 114). These cases have been cited as authority for the proposition that at common law medical attendance is not a necessity, thus in Regina v. Beer, already referred to, the court, referring to Regina v. Wagstaffe, expressed grave doubts as to whether or not at common law medical attendance was a necessity.[7] In considering these cases, which, referring to no precedents, stand by themselves as possible expositions of the common law, is it not proper, yea, is it not necessary to look at the facts before the court when the opinions were delivered, and to interpret the language and expressions of the court in the light of those facts. Undoubtedly if such a course is not pursued, much that is said by the court in each of these cases might well be taken to support the position which they have so often been taken to uphold. In Regina v. Wagstaffe the defendants were indicted for manslaughter for neglecting to supply their child proper medical attendance, they belonged to a sect known as "peculiar people," one of whose tenets was that the follower should not call in a physician in case of illness, but trust to Providence. The defendants testified that the child, an infant of fourteen month, had always been delicate, and had coughed a good deal; that they, the defendants, thought that the death of the child was due to teething; that they did not know that the disease was inflammation; that the child had not seem to suffer a great deal; it was admitted that the defendants had loved, nursed and in a general way cared for the child, and had, following their religious belief, called in the elders and annointed the child with oil. The court, speaking through Justice Willis, in summing up the case to the jury, among other things, said, "that he thought he might go so far as to say that the course taken by the defendant was in this case as sensible and reasonable as, supposing a man broke his leg, it would be absurd to call in the elders of the church and annoint him with oil." This statement of the court, we believe, sheds some light upon the real theory on which the case was decided, and is, it seems, as easily explainable on the theory that the court recognized that medical attendance might be a necessity, as that it could in no case be such. If, for instance,

[3] Regina v. Edwards, 8 C. & I. 6110; Regina v. Wagstaffe, 10 Cox, Crim. Cases, 530; Regina v. Mobbett, 5 Cox, C. C. 339; Regina v. Conde, 10 Cox, C. C. 547; Regina v. Hook, 4 Cox, C. C. 460; Russell, Law of Crimes, 80; Meyers' Fed. Dec. vol. 12, pp. 654, 655.

[4] Corsi v. Maretzek, 4 E. Smith (N. Y. Common Pleas.)

[5] Cited in Regina v. Low, B & H., Leading Crim. Cases, p. 68. See also Russell's Law of Crimes, vol. 1, p. 678.

[6] Woods v. O'Kelley, 8 Cush. 406; Grace v. Hale, 2 Humph. 27; McMillan v. Lee, 78 Ill. 444; Mayhew v. Thayer, 8 Gray, 172.

[7] Regina v. Downes, 13 Cox, Crim. Cases, 111; Queen v. Coventry, N. W. Territory Report, part 1, vol. 2, p. 245.

as a legal proposition, it was never a necessity, then no legal duty devolved upon a parent to furnish such attendance, and if no legal duty existed, then, as we have said, there could be no criminal responsibility for a failure to perform that duty. Decision after decision have uniformly made short work of criminal prosecutions in which no legal duty on the part of the defendant to do the act omitted to be done had been proven.[8]

Why, therefore, in this case, discuss the question of religious belief? Why call the attention of the jury to the fact that in the opinion of the court the actions of the defendants under all the circumstances appeared to be reasonable and sensible; why remark upon the case of a person suffering from a broken leg, and imply that in such case the decision of the jury might well be expected to be different? If medical attendance is never a necessity then certainly in the case of the broken leg as in the case under the direct attention of the court there would be no criminal responsibility resting on the parent for a failure to procure it. If, on the other hand, such attendance might or might not be a necessity depending upon the particular facts in the case, then immediately it would be important to inquire whether or not the defendants in this case had acted as reasonable and sensible men should act. The court further says, "that there is a great difference between neglecting a child in respect to food with regard to which there could be but one opinion, and neglect of medical attention as to which there might be many opinions;" but, as we have said, this statement should be interpreted, looking at the facts, in that case before the court. Some articles, such as food, are from their very nature *per se* necessities; others, and among them medicine and medical attendance, would or would not be necessities, depending upon the varying facts in the individual case. Certainly, to a child in health, medicine is a superfluity, and can become a necessity only depending upon certain conditions existing in the infant. The court had under its consideration a case in which medical attendance might well be decided at least from the facts known to the parent to have been unnecessary. Supposing, however, an infant severed an artery, and was slowly bleeding to death, and supposing the father knowing such to be the case, stood by and offered prayers only for his child's recovery, would the reasoning in Regina v. Wagstaffe justify an acquittal in such case? Would food and medical attendance then appear so essentially different in character? Would not Justice Willes himself, upon the suggestion offered by him of the case of a broken leg, have decided properly that such action by the parent in the latter case was not reasonable or sensible?

[8] Cent. L. J., June 2, 1882, sec. 156; Wharton's Crim. Law, 329; Wharton's Homicide, 73 (10th. Ed.), sec. 32; Rex v. Friend, Russ. & Ry. 45; Queen v. Coventry, N. W. Territory Rep., part 1, vol. 2; Regina v. Justan, 17 Cox, C. C. 602; Wharton's Criminal Law, par. L 30; Belk v. People, 125 Ill. 584; Rex v. Smith, 2 C. & P. 449.

And yet, if medical attendance is never a necessity, no logical reason can be given for a criminal responsibility resting upon the parent in one case any more than the other. If, on the other hand, medical attendance may be a necessity, it does not mean that every parent whose child dies without such attendance becomes liable to a criminal charge of manslaughter. The question of criminal responsibility would in that case ultimately resolve itself into a question of whether the defendant did, in a particular instance, act as a reasonably prudent man in like circumstances should have acted. Where doubt exists as to what conduct should be pursued in a particular case, where intelligent men differ as to the proper action to be taken, the law does not impute guilt to anyone, if from an omission to adopt one course instead of another evil consequences follow. If medical attendance is a necessity at common law under certain circumstances, it simply means that in each case the question would arise as to whether the facts known to the parent, or which should have been known, were such as would put a reasonably prudent man upon notice that medical attendance should be provided. When such facts were present, at that time and not before, such attendance would, in the eye of the law, become a necessity, such that a legal obligation would arise to supply that necessity, and with it a criminal liability for a willful omission to perform a legal duty. I have referred to the case of Regina v. Wagstaffe at greater length possibly than I should; it is the rock in what otherwise might be a comparatively safe and well-known channel; but for it, the sailing would probably have been smooth; with it, the law has continued in a state of doubt and confusion. Although heretofore, the decisions in our courts upon this question have been singularly few, the subject is becoming steadily more prominent, and we may expect that, at no very distant time, in some of our jurisdictions, this question will come forward for judicial determination.

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Before the Illinois Bar Assn.

INTOXICANTS UNDER THE POLICE POWER.

1. Intoxicating Liquors.
2. Constitutionality of Liquor Laws.
3. Imported Liquors.
4. Destruction of Intoxicants.
5. Opium.

1. *Intoxicating Liquors.*—It is the duty ot the state to protect its citizens and advance the safety and prosperity of its people, and there can be no doubt as to the power of the state to pass laws regulating the sale of intoxicating liquors, designed to promote and protect the community at large. So statutes have been upheld which prohibit the sale of intoxicating liquors or wines on Sunday, playing

cards on Sunday, prohibiting the setting up of gaming tables, and many others of the like character, because such laws are within the police power to regulate and prohibit such things on the ground of their demoralizing tendency. The acknowledged power of the state to protect the morals, the health and safety of its people by appropriate laws is recognized as an inherent power belonging to every sovereignty. The states have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the legislature, provided, always, they do not transcend the limitations of state authority by invading rights which are secured by the constitution of the United States, and provided further that the regulations as adopted do not operate and discriminate against the rights of residents or citizens of other states of the union.[1] Of course, in controlling the importation of liquors, the state must not discriminate in favor of her own dealers or infringe upon the rights of congress to control interstate commerce, as this belongs to congress which may enact laws giving the state control of imported liquors as soon as landed in its territory.[2]

2. *Constitutionality of Liquor Laws.*—The fourteenth amendment to the constitution of the United States does not take away from the states those powers of police that were reserved at the time of the original constitution was adopted. This amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; but it was never designed to interfere with the power of the state to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and order.[3]

This acknowledged power of the states to protect the morals, the health and safety of their people by proper legislation, sometimes touches in its exercise the line separating the respective domains of national and state authority; but the United States will not strike down a legislative enactment of a state, especially if it has direct connection with the social order, the health and the morals of the people, unless such legislation openly and palpably violates some right granted or secured by the national constitution or encroaches upon the authority delegated to the United States for the attainment of objects of national concern.[4]

The morals of the people must be protected, and any practice or business encroaching upon the morality of the community may be regulated or suppressed. Thus, a statute forbidding the employment of women in any saloon, beer hall, barroom, theater or other place of amusement where intoxicating liquors are sold as a beverage, does not abridge the privileges and immunities of citizens or deny the equal protection of the laws within the meaning of the fourteenth amendment to the federal constitution, but is a valid exercise of the police power.[5] It has been customary from time immemorial for the legislature in enacting new laws to have in mind existing known evils, and to construct statutes with reference to particular forms of wrong doing which have attracted public attention, and to bring them under the police power.

State legislation which prohibits the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limitations of its jurisdiction to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the constitution of the United States or by the fourteenth amendment thereto.[6] And a corporation under its charter has no greater right to manufacture or sell liquors than individuals possess, nor does it exempt from any legislative control therein to which they are subject. All rights are held subject to the police power, and if the public safety and the public morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance notwithstanding individuals or corporations may thereby suffer inconvenience.[7] For the purpose of protecting its people against the evils of intemperance, the state has the right to prohibit the manufacture within its limits all intoxicating liquors; it

[1] Vance v. Vandercook Co., 170 U. S. 438.
[2] 26 U. S. Stat. 313.
[3] Barbier v. Connally, 113 U. S. 27, 31; *In re* Kemmler, 136 U. S. 436; Giozza v. Tiernan, 148 U. S. 657;
[4] Plumley v. Massachusetts, 155 Mass. 461, 482.
[5] *In re* Considine, 83 Fed. Rep. 157; Hoboken v. Goodman (N. J.), 55 Cent. L. Journal, 10 and note.
[6] Mugler v. Kansas, 123 U. S. 623.
[7] Beer Co. v. Massachusetts, 97 U. S. 25.

may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other states or from other countries; it may punish those who sell them in violation af its laws; it may adopt any measure tending even indirectly and remotely to make the laws effective until it passes the line delegated to congress under the constitution.[8]

The power to pass laws regulating the sale of intoxicating liquors, inspection laws, quarantine and health laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to locality, essentially to local intercommunication, to the progress and development of local prosperity, and to the protection of the safety and the health of society originally reserved to the state except so far as falling within the scope of the power confided to the general government. Where in violation of the subject-matter different rules may be suitable for different localities, the state may exercise powers which, though they may be such as to partake of the nature of the power granted to the general government, are strictly not such but are simply local powers which have full operation until or unless circumscribed by acts of congress in effectuation of its powers.[9]

3. *Imported Liquors.*—By act of congress the receiver of intoxicating liquors in one state sent from another can no longer assert the right to sell in defiance of the state law in the original package because congress has recognized to the contrary.[10]

The constitutional power of congress to pass such an enactment is upheld, and the purpose of congress in adopting it was to allow state laws to operate on liquors shipped into one state from another so as to prevent the sale in the original package in violation of state law.[11] But the power of the state does not attach to the intoxicating liquors when in course of transit and until received and delivered. But the act of congress was to allow such laws to attach to intoxicating liquors received by interstate commerce shipments before sale in the original package, and therefore at such a time as to prevent such sale if made unlawful by the state law.[12]

When the prohibition of the importation of wines and liquors of other states by citizens of a state for their own use is made and does not depend on the purity of the articles, and only state functionaries are permitted to import into the state, and so those citizens who wish to use foreign wines and liquors are deprived of the exercise of their own judgment and taste in the selection of commodities, it is an unjust discrimination and therefore void. A law which creates such officers or agents with authority to buy liquor exclusively to be sold in the state and which forbids the sale of any liquor except that so bought and offered for sale by the state officers or agents, is in violation of the constitution of the United States, because amounting to an unjust discrimination against liquors produced in other states.[13] A state statute is unconstitutional when it endeavors to compel a resident of the state who desires or orders alcoholic liquors for his own use first to communicate his purpose to a state chemist, and deprives a non-resident of the right to ship by means of interstate commerce any liquor into the state unless previous authority is obtained from the officer of the state; because this regulation subjects the constitutional right of the non-resident to ship into the state and of the resident of the state to receive for his own use, under conditions which are wholly incompatible with, and repugnant to, the existence of the right which the state itself acknowledges. Because the power to ship merchandise from one state into another carries with it as an incident the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; for the goods received by interstate commerce remain under the protection of the interstate commerce clause of the constitution until by sale in the original package they become mixed with the general mass of the property of the state. The right of the citizen of another state to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the state without admitting the power of that officer to control the exercise of the right. But the right arises from the constitution of the United States; it exists wholly independent of the will of either the law-making or the executive power of the state; it takes its origin outside

[8] Bowman v. Railroad Co., 125 U. S. 465, 493.
[9] Cooley v. Wardens, 12 How. 299.
[10] 26 U. S. Stat. 313, "Wilson Bill" of 1890.
[11] *In re* Raher, 140 U. S. 545.
[12] Rhodes v. Iowa, 170 U. S. 412.
[13] Scott v. Donald, 165 U. S. 58.

of the state and finds its support in the constitution of the United States.[14]

4. *Destruction of Intoxicants.*—Whether intoxicants can be destroyed under the police power is a question not answered the same by the different courts. It would seem that where a prohibition law is in force and a party has such articles when the law took effect, but did not intend to sell them contrary to law, they cannot be destroyed. The legislature has the right to regulate the sale and disposal of intoxicating liquors upon such view of policy of economy or morals as may be addressed to its discretion; but the legislature has no authority to confiscate and destroy property lawfully acquired by citizens in intoxicating liquors and provide for their seizure without due process of law.[15] But it has been held that when a person buys intoxicating liquors for the purpose of selling them against the law, then the state may seize and destroy them without compensation, as such action on the part of the seller produced a nuisance.[16] But the cases are variant on this point and no general rule can be laid down to cover every case.

But a state, as a source of police regulation looking to the preservation of public morals and the general welfare, may make a law prohibiting the manufacture and sale of intoxicating liquors.[17] Because a state may control their internal affairs and in so doing protect the health, morals and safety of its people by regulations that do not interfere with the execution of the powers of the general government.[18]

The exercise of the police power by the distruction of property which is itself a public nuisance, or the prohibiting of its use in a particular way, whereby its value depreciates, is very different from taking property for public use or from depriving a person of his property without due process of law. In the one case a nuisance only is abated; in the other unoffensive property is taken away from an innocent owner. And so a legislature in the exercise of the police power may prohibit the manufacture and sale within the state, all spirituous, malt, vinous, fermented and other intoxicating liquors publicly used as a beverage, and the law may be enforced against persons who at the time happened to own property whose chief value consists in its fitness for such manufactured purposes without compensating them for the diminution in its value resulting from such prohibitory enactmemt. The prohibition upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals and safety of the community, is not an appropriation of property for the public benefit in the sense in which a taking of property by the exercise of the state's power of eminent domain as such taking or appropriation. And so the state has the constitutional power to declare that any place kept and maintained for the illegal manufacture and sale of intoxicating liquors shall be abated as being a nuisance.[19] But this declaration of the highest judicial authority in the United States does not say that such property shall be destroyed without a hearing before the proper tribunal.

5. *Opium.*—The legislature may regulate traffic intimately connected with public morals, safety and prosperity,[20] and in the interest of good morals or good order and peace of society for the prevention of crime, misery and want, the legislature has authority to place such restrictions upon the sale or disposal of opium as will mitigate, if not suppress, its evils to society,[21] by preventing the unhealthful practice of smoking opium.[22] And so a statute making it unlawful to maintain a place for smoking opium is not unconstitutional as being class legislation or otherwise violative of the rights of the citizen.[23] And an act which forbids the sale or gift of opium to any one but a druggist or practicing physician, except on the prescription of a physician is valid, under the police power of the state, and not in conflict with the federal constitution.[24]

D. H. PINGREY.

Bloomington, Ill.

[14] Vance v. Vandercook Co., 170 U. S. 438.
[15] Wynehanur v. People, 13 N. Y. 378.
[16] Oviatt v. Paul, 29 Conn. 479.
[17] Beer Co. v. Massachusetts, 97 U. S. 25, 33.
[18] Foster v. Kansas, 112 U. S. 201.
[19] Mugler v. Kansas, 123 U. S. 623.
[20] Metropolitan Board v. Borrie, 34 N. Y. 657.
[21] State v. Ah Chew, 16 Nev. 50.
[22] *In re* Lee Tong, 9 Saw. 333.
[23] State v. Lee, 137 Mo. 143.
[24] *Ex parte* Yung You, 28 Fed. Rep. 308.

WILLS—WHAT IS MEANT BY NEXT OF KIN.

IN RE DEVOE.

Court of Appeals of New York, May 20, 1902.

A will provided that, on the death of certain legatees before the term limited for the payment thereof, the share of any deceased legatee should be paid over to their "next of kin" according to the statute of distributions. Held, that the widow of a deceased legatee is not entitled to share in the legacy her husband would have taken had he lived at the time of the payment, since she is not of "the next of kin," and the direction as to such payment does not extend the meaning of such term so as to include such widow.

O'Brien and Bartlett, JJ., dissenting.

CULLEN, J.: I concur in the view of Judge O'Brien as to the difficulties and perplexities which attend the construction of wills. I admit that they proceed largely from the inaccurate use of language in the instruments, but I insist that they are also largely occasioned by the conflicting decisions of the courts. I think a review of the numerous antagonistic decisions cited by Mr. Jarman in his work on Wills makes it apparent that this is a most potent factor in the creation of the difficulties. The trite aphorism that the intention of the testator is to be deemed the polar star in the interpretation of a will has, it seems to me, but little application where the very subject in controversy is, what was that intention? The state has a large interest in this subject, for it is certainly to the public detriment that the construction of wills should create such a large and increasing field for litigation, thus involving not only uncertainty in the tenure and titles of property, but imposing a great cost on the state itself. It is conceded that in its primary meaning the term "next of kin" includes neither a widow nor a husband. I think that it is settled by authority in this state that a direction that the property shall be distributed among the next of kin, the same as in the case of intestacy, is not sufficient to extend the meaning of the term "next of kin" to include either of the relatives named, though he or she would share in the property of the deceased if it were a case of actual intestacy. The clause of the will in construction on this appeal is: "In case of the death of any of the beneficiaries or persons entitled to share in the investments herein directed to be made before the time limited for the payment thereof, my will is that the same be paid over to their next of kin as, according to the statute of distributions, their personal estates would be divided and distributed." The argument is that the property cannot be paid over according to the statute of distributions unless the widow is allowed to share. I am not disposed to underrate the force of this contention, and, if it were an original proposition, it might command my assent. Let us see, however, how far it is consistent with the decided cases. In Murdock v. Ward, 67 N. Y. 387, the will provided that, upon the death of the beneficiaries without receiving the principal, then it was "to be equally divided among and paid to the persons entitled thereto as their, or either of their, next of kin, according to the laws of the state of New York, and as if the same were personal property, and they, or either of them, had died intestate." The same argument was there made for extending the meaning of "next of kin" as has been advanced in this case. Yet this court held, reversing the decision of the general term, that the widow did not take. In Luce v. Dunham, 69 N. Y. 36, the will, after a gift to testator's wife of the homestead and a legacy, proceeded: "All the rest, residue, and remainder of my estate, real and personal, present and hereafter to be acquired, and wherever situated, I give, devise, and bequeath, and do desire and will that the same shall be divided among my heirs and next of kin in the same manner as it would be by the laws of the state of New York had I died intestate." It was held that the widow did not take, and it is to be remarked that in that case the decision was against the testator's own widow,—not, as here, against the widow of a legatee. Speaking of the argument made here, Judge Rapallo said: "The same position was taken and argued by counsel with much force in the case of Murdock v. Ward, 67 N. Y. 387, and it was urged that a distribution could not be made according to the statute without including the widow. Some of the judges, while the case was under consideration in this court, were strongly inclined to maintain the position contended for; but a full examination of the authorittes constrained them to abandon it, and it was finally held that, where the bequest was to the next of kin, the addition of the words, 'according to the statute as in case of intestacy,' was not sufficient to enlarge the class of legatees, so as to include the widow." The question again came before this court in Platt v. Mickle, 137 N. Y. 103, 32 N. E. Rep. 1070. In that case the will read: "And I thereupon after his [the life tenant's] decease give * * * said rest and residue * * * to such person or persons as shall then be the heirs at law and next of kin of my grandson George Benjamin, respectively, in such parts, shares, and proportions as, having regard to the form in which the said estate shall then exist, such heirs and next of kin would have been then respectively entitled thereto and therein by law if my said grandson had been seised thereof in fee-simple as an inheritance on the part of his mother, or possessed of the same, and he had died intestate, and they had inherited or become entitled thereto from my said grandson." Again it was held that under such a provision the widow was not entitled to share in the estate. Judge Gray there wrote: "The case is governed by Murdock v. Ward, 67 N. Y. 387, and the other authorities cited below by Judge Lawrence in his careful opinion. I find no authority for giving to these words an enlarged sense, in the absence of something in the context or of some requirement of a statute which would furnish the court with a reason for doing so." Plainly, the learned judge did not deem the qualification that the distribution

should be made as in case of intestacy to constitute "something in the context" to justify interpreting the term "next of kin" in an enlarged sense. Of course, the language used differs in the different cases, but the effect of it is the same in all. In fact, the appellant's argument could have been more forcibly made in any of the cases cited than in the one before us. Nor is there any such uniformity of sentiment on this subject as there is with reference to the disinheritance of children,—an intent to effect which the courts are loath to impute to a testator unless it be unmistakably expressed, and properly loath, because in all probability the testator had no such intent. It might be more decent, where a large estate is given to a man for life, the principal to go to his issue or to his heirs, to make some provision for his wife in case she survives him. An examination of the cases, however, shows that it is not the prevalent practice, and that a testator rarely makes provision for the surviving wife of the life tenant, and in the analogous case of a surviving husband practically never makes provision for him, unless in a few exceptional instances where the husband is in existence at the time, and known to the testator.

Reliance is placed by the appellant on the case of Betsinger v. Chapman, 88 N. Y. 487. It was there held that a widow could bring an action to recover her distributive share under sections 9 and 10 of title 5 of chapter 6 of part 2 of the Revised Statutes, authorizing such suits to be maintained "by any legatee or by any of the next of kin." That decision proceeded, however, on the ground that unless the term "next of kin," in this title of the statute, was given this extended meaning, no provision was to be there found providing for the citation of the widow on an accounting, for making a decree thereon conclusive against her, or for enabling a creditor of the estate to recover from her the value of the assets thereof she might have received. In that case Judge Andrews refers to the cases of Murdock v. Ward, 67 N. Y. 387, and Luce v. Dunham, 69 N. Y. 36, but in no respect does he criticise either. The decision cannot, therefore, be considered as impairing the authority of the earlier cases. However that may be, Platt v. Mickle, *supra*, is the last authority in this court and is controlling. I think that the decisions of this court on the construction of provisions in wills similar to the one now before us have created a rule of property which we are not justified in overthrowing, especially where the proposition that the testator might have had a different intent from that we have ascribed to him is the merest surmise. Probably he never thought on the subject, and what testamentary disposition he would have made had the contingency that has arisen been called to his attention, no one can tell.

The order appealed from should be affirmed, with costs payable out of the estate.

NOTE.—*Construction of Phrase "Next of Kin" in a Will or Statute as Including the Husband or Wife, Where Used Either Simpliciter or in Reference to the Statute of Distributions.*—The question stated in the subject of this annotation is one of the many controverted and unsettled questions in the law. The difficulty in this particular subject, however, is not in finding the exact meaning of the phrase "next of kin," but in endeavoring to find out what the legislature or the testator meant to express by using it. It is an axiomatic rule of law that words are to be taken in their ordinary meaning. In such cases is the "popular" meaning the "ordinary" meaning. Undoubtedly the phrase "next of kin" is often popularly used to signify a man's kin by affinity as well as by consanguinity. But if by "ordinary" meaning is meant the exact technical meaning of the words, it is certain it does not extend to relation by affinity. The next of kin of a decedent or a testator, accurately speaking, are those persons nearest in degree who are related to him by blood. But the authorities are not agreed as to the meaning to be ascribed to this term when used in a statute or will under certain circumstances. In Underhill on Wills, sec. 626, the learned author says: "Much divergence of opinion existed in the early cases as to the construction of the words 'next of kin.' If the testator, in a gift to the next of kin, refers expressly or by implication to the statute of distribution, he will be conclusively presumed to mean, by next of kin, those persons only who take personal property under that statute. On the other hand, where the gift is *simply* to the next of kin, without any reference to the statute, the rule now is that the testator means his nearest relations, those persons who are most nearly related to him by consanguinity." Where the wife takes under the statute of distributions, although not under the designation of "next of kin," it becomes an interesting question to determine her rights where both terms are used by a testator co-ordinately.

Let us examine the authorities in detail. In Haraden v. Larrabee, 113 Mass. 430, it was held that a widow cannot take under a devise to "next of kin" of the husband, even though the testator goes on to say: "To those persons whom the property would go provided he owned the property and died without issue and intestate." The court said: "The words 'next of kin' are limited in legal meaning, as in common use to blood relations, and do not include a husband or a wife, unless accompanied by other words clearly manifesting a purpose to extend their signification; and the mere addition of a reference to the statute of distributions is not sufficient." The leading English case is to the same effect. Garrick v. Camden, 14 Ves. 372. In that case the testator, after providing for certain parties, directed any surplus to be divided "amongst any next of kin as if I had died intestate." Lord Eldon held that the wife was not entitled to share in the residue. In French v. French, 84 Iowa, 655, it was held that a widow is one of the "next of kin" of her deceased husband, within the meaning of a statute protecting the "executor, administrator, heir at law, next of kin, legatee, devisee or survivor" of such person from the testimony of an adverse party in a suit as to any personal transaction with the deceased. So also in Hibbard v. Odell, 16 Wis. 664, where it was held that under a statute in regard to change of forum, which provides that "when it shall appear that the justice is near of kin to either party he shall remove the case to some other justice of the same county." So also in the case of Rebsinger v. Chapman, 88 N. Y. 491, where it was held that the words "next of kin," in a statute which provided for the bringing of an action against an executor or administrator "by any legatee, or by any of the next

of kin entitled to share in the distribution of the estate," included the widow of the decedent. In commenting upon these authorities the court, in French v. French, *supra*, said: "The rule to be drawn from these authorities is in harmony with that which governs the construction of statutes generally, and which requires us to so interpret them as to give force and effect to the legislative intent where that is clearly expressed. * * * The widow who claims under the will of her deceased husband has the protection of the statute. But if her husband died intestate, or if she refuse to accept the provisions of his will, she is as clearly within the spirit of the statute as though she claimed under his will. It cannot be accepted as true that the legislature intended to protect the widow only when she claimed as devisee or legatee. No good and sufficient ground for such a theory has been suggested. We conclude, therefore, that the words 'next of kin' were used in the statute in the broader sense which includes relations by marriage, who are entitled by law to a distributive share in the estate of the decedent."

The question also arises in the construction of statutes relating to actions for death and distribution of the amount secured as damages. In Ohio the statute gives a cause of action for death to the "widow and next of kin." The case of Steel v. Kurtz, 28 Ohio St. 192, was an action by the personal representative to recover damages for the death of a woman, who died leaving a husband but no children. The court held that the surviving husband was, within the meaning of the act, the "next of kin," and as such entitled to the fruits of any judgment obtained in the action. A contrary rule is announced in the New York cases, the reasoning of which was disapproved in the Ohio case just cited. Lucas v. Railroad Company, 21 Barb. 345; Green v. Railroad Company, 32 Barb. 25. In the last case cited the court said: "The statute authorizes an action to be brought when death is caused by the wrongful act, neglect or default of another 'for the benefit of the widow or next of kin of such deceased person.' The husband is not named, and it is some evidence that 'next of kin' was used in its legitimate and proper sense that the wife is especially named. The legislature evidently had not the vague idea that 'next of kin' included every one who could, by reason of mere relationship to the deceased, share in his estate. All the cases agree that to maintain the action there must be either a wife or next of kin to the deceased who have sustained a pecuniary loss by his death, the husband is in no sense of the word the 'next of kin' to the wife."

Later English cases seem to have adopted the broader meaning of the term "next of kin." Thus, in *Re* Collins' Trusts, 33 L. T. 437, it was held that the widow of testator's son is entitled to share among the persons described by will as his "next of kin," where that phrase is immediately followed by the words "at the time of his decease under and according to the statute of distribution." See also Withy v. Mangles, 10 Clark & F. 215; *In Re* Stevens' Trusts, L. R. 15 Eq. 110; Wingfield v. Wing, 9 Ch. D. 658. This broader meaning is also adopted by the following American courts when by the terms of a will or other instrument personal property ultimately devolves upon the "next of kin" or "heirs." These words in such cases are construed to mean "distributees." Sweet v. Dutton, 109 Mass. 589, 12 Am. Rep. 744; Collier v. Collier's Extrs., 3 Ohio St. 369; Eby's Appeal, 84 Pa. 241; Corbitt v. Corbitt, 54 N. Car. 114; Welch v. Crater, 32 N. J. Eq. 177.

JETSAM AND FLOTSAM.

EVASION OF LIBEL LAWS BY SENDING LIBELOUS MATTER IN INSTALLMENTS.

A curious story comes from Kansas of a man who wanted to tell a neighbor what he thought of him without laying himself open to a suit for damages. So he hit on a plan of sending him each day a postal card with only one word written on it in a large hand, in addition to the date obscurely tucked away in a corner. The person receiving the cards recognized the handwriting, and, suspecting something, kept them until they stopped coming, when he read them consecutively in the order of their reception. What he read was, "Ridiculous old Bill Jones is the meanest cuss in town," and he at once instituted a suit for slander against the sender. The latter's lawyer, however, called attention to the fact that the postal card containing "ridiculous," though mailed first, was dated the day after the date of the card having the word "town." Moreover, a careful inspection would show that after the word "ridiculous" was an exclamation point, and after the word "town" was an interrogation mark, so that the series of postal cards might be made to read, "Old Bill Jones is the meanest cuss in town? Ridiculous!" He claimed, therefore, that instead of slandering the plaintiff his client had defended him from slander, and this plea was sustained by the court. But, all the same, everybody in town insisted that the first reading of the cards was the correct one, so that the writer attained his object.—*Cases Cited.*

BOOK REVIEWS.

NELLIS ON STREET SURFACE RAILROADS.

It would seem to be the tendency of law publishers to see to it that every important department of commerce or business activity shall have the honor of a separate treatise gathering together the cases applying general principles of law to that particular subject matter. Whether this tendency is a wise one may be doubtful, but as there seems to be a demand for such works, the blame for their publication does not rest altogether upon the publishers. Lawyers, in the busy times in which we live, seem to have no time nor inclination to master the principles of law and solve the doubtful questions that demand their attention by original methods of reasoning, but seem inclined to turn to the nearest text-book or digest on that particular subject and find a few authorities "on all fours" with theirs. We are not in a spirit to criticise this method of practicing law, as experience seems to show it to be as remunerative if not as enjoyable as the more laborious method of reasoning from principle. To such lawyers the recent work of Mr. Andrew J. Nellis on the subject of Street Surface Railroads will be found an ideal representative of its kind and more than usually acceptable. The author distinctly disclaims the impertinence of putting into his book any "ideas of his own," but candidly states that the book is "rather a digest of the decisions, and statements of the reasons therefor, where such statements are given, in words, as nearly as may be, of the court giving them utterance." The book is well arranged and puts in accessible form the great mass of law on the particular subject of which it treats. Bound in one volume of 784 pages, and published by Mathew Bender, Albany, N. Y.

PROBATE REPORTS, ANNOTATED, VOL. 6.

We have had occasions to observe more than once the tendency toward specialism in the law. In the

very large cities the specialist is multiplying quite rapidly. The criminal lawyer, the corporation lawyer, the insurance lawyer, the patent lawyer, and the probate lawyer are already common. To meet this trend toward specialism in the practice the law writers and publishers have begun to specialize in the preparation of text books and select reports. Of this character is the volume we have announced as the subject of this review. It is a choice selection of recent cases on points of probate law with interesting and extended notes by Frank S. Rice and George A. Clement, of the New York bar. The plan of this new series of reports is to give in about one volume a year, contemporaneous or recent decisions of the highest courts of the different states of the union upon all matters cognizable in probate and surrogate courts. Each volume contains about 1001 cases (in full) with numerous and exhaustive notes and references. Among the latter some very interesting monographs are observable in this volume; especially one on the construction of the word "money" as a subject of bequest, p. 26. Mention might also be made of the following annotations: "Effect of Destruction of a Will on Prior Will," p. 6; "Income of Trust Fund or Property as Subject to Claims of Creditors," p. 485; "Survivorship in Common Disaster," p. 460; "Jurisdiction of Chancery as to Maintenance of an Infant," p. 253. Printed in one volume of 832 pages, and published by Baker, Voorhis & Co., New York.

BOOKS RECEIVED.

The Employers' Liability Acts and the Assumption of Risks in New York, Massachusetts, Indiana, Alabama, Colorado and England. By Frank F. Dresser, A. B., A. M. of the Massachusetts Bar. St. Paul. Keefe-Davidson Company, 1902. Sheep, pp. 881. Review will follow.

HUMORS OF THE LAW.

"Did youse git anything?" whispered the burglar on guard, as his pal emerged from the window.

"Naw de bloke wot lives here is a lawyer," replied the other, in disgust.

"Dat's hard luck," replied the first; "did youse lose anyt'ing?"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ADMIRALTY—Admissions.—Statements made by the master of a vessel after a collision as to the manner of its occurrence are receivable as admissions against the owners in an action against them for the collision.—The Severn, U. S. D. C., E. D. Va., 113 Fed. Rep. 578.

2. ADMIRALTY—Maritime Liens.— Under Rev. St. § 563, cl. 8, a district court has jurisdiction of a suit to enforce a maritime lien created by a state statute for a penalty incurred by the failure to obey a regulation which is maritime in its nature.—The Lida Fowler, U. S. D. C., E. D. Pa., 113 Fed. Rep. 605.

3. ADVERSE POSSESSION — Notice. — The question of sufficiency of notice of adverse possession is one for the jury.—Bryce v. Cayce, S. Car., 40 S. E. Rep. 948.

4. ALIENS - Exclusion of Immigrants.—The decision of the immigration officers, denying to an immigrant, conceded to be an alien, the right to land, is not reviewable by the courts.—*In re* Gayde, U. S. C. C., S. D. N. Y., 113 Fed. Red. 588.

5. APPEAL AND ERROR - Bail.—The fact that defendant has been tried and convicted three times on the same indictment for embezzling funds of a national bank is not sufficient ground for denying bail pending a third writ of error.—McKnight v. United States, U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 451.

6. APPEAL AND ERROR—Certified Questions.—The court of civil appeals will not certify a question to the supreme court unless some one of its members is in doubt about the question certified, or the question itself is of great public interest. — Habermann v. Heidrich, Tex., 66 S. W. Rep. 795.

7. APPEAL—Costs of New Trial.—An order granting a new trial for mistake of the jury, without imposing the costs of the first trial, will be affirmed only on payment of those costs and the costs of an appeal therefrom.—Helgers v. Staten Island Midland R. Co., 75 N. Y. Supp. 34.

8. APPEAL AND ERROR—Findings of Master.—Findings of a master on matters of fact are not to be disturbed, unless clearly in conflict with the weight of evidence.—John Hancock Mut. Life Ins. Co. v. Houpt, U. S. C. C., W. D. Pa., 113 Fed. Rep. 572.

9. APPEAL AND ERROR— Instructions.—An assignment of error complaining of an erroneous instruction is without merit, where the court on plaintiff's exceptions qualified the instruction, and plaintiff took no further exception.—Metropolitan St. Ry. Co. v. Hudson, U. S. C. C. of App., Second Circuit, 113 Fed. Rep. 449.

10. APPEAL AND ERROR—Question of Fact.—The evidence being conflicting as to the genuineness of the signature to a note, the chancellor's finding that the note was not genuine will not be disturbed. - Carpenter v. Carpenter, Ky., 66 S. W. Rep. 814.

11. APPEAL AND ERROR — Reversal of Judgment. — When a judgment appealed from was based on and merely intended to carry into effect another judgment, which has since been reversed, it must also be reversed.—Mitchell v. Stoddard Co. Bank, Ky., 66 S. W. Rep. 823.

12. APPEAL AND ERROR—Review.—When there have been two trials, and the verdict on the first has been set aside, and exception taken, and the evidence certified, and the appellate court finds error in the setting aside, it will annul all subsequent proceedings and render judgment. - Wood v. American Nat. Bank, Va., 40 S. E. Rep. 931.

13. APPEAL AND ERROR — Sufficiency.— Where objections to the form of a petition for a writ of *habeas corpus*

are not urged in the district court, they will not be considered on appeal.—United States v. Lee Yen Tai, U. S. C. C. of App., Second Circuit, 113 Fed. Rep. 465.

14. APPEAL AND ERROR — Transfer. — Under Code, § 3318, the clerk of the court to which a cause was transferred alone could certify the record or take the bond required in order to perfect an appeal. Smith v. Pyrites Mining & Chemical Co., Va., 40 S. E. Rep. 918.

15. APPEAL AND ERROR—Writ of Error.— Under Rev. St. art. 1389, the court will assume jurisdiction under writ of error sued out within a year after judgment was entered as corrected. — Hall v. Read, Tex., 66 S. W. Rep. 809.

16. APPEARANCE—Jurisdiction.—Appearance to move to set aside judgment rendered without service held not to give the court jurisdiction of the person of defendant.—Wren v. Johnson, S. Car., 40 S. E. Rep. 937.

17. ARBITRATION AND AWARD - Illegal Transactions.— An award founded on a submission to arbitration of a claim arising out of an illegal transaction is a mere nullity. - Benton v. Singleton, Ga., 40 S. E. Rep. 811.

18. ASSIGNMENT — Contract. — A contract by which a street railroad company obligates itself to construct and operate a street railroad is assignable under the general law and under Rev. St. art. 308. - Lakeview Land Co. v. San Antonio Traction Co., Tex., 66 S. W. Rep. 766.

19. ASSIGNMENTS— Validity. — Where, in an action by the assignee of a firm debt, issue was joined as to the assignment, and the claim appeared on the books in the name of the assignor "in trust," it was error to exclude evidence that the assignor was a trustee, and as to the nature of the trust. — Chambers v. Webster, 75 N. Y. Supp. 31.

20. ATTACHMENT—Insufficient Allegation.— An allegation in an affidavit for attachment that "deponent will allege in his complaint herein" certain facts is not an allegation of the truth of such matter, and is bad.—Axford v. Seguine, 75 N. Y. Supp. 35.

21. ATTACHMENT— Sufficiency. — In attachment for injuries to property, the amount of the damage only need to be stated. — Chitty v. Pennsylvania Ry. Co., S. Car., 40 S. E. Rep. 944.

22. BANKRUPTCY - Choosing Trustees. — Under Bankr. Act 1898, § 56a, in determining whether a trustee has received a majority vote, a claim though allowed, is not to be counted; the creditor not being present, and the power of attorney of his proxy being insufficient.— *In re* Henschel, U. S. C. C. of App., Second Circuit, 113 Fed. Rep. 443.

23. BANKRUPTCY — Debts Affected by a Discharge. — Under Bankr. Act 1898, § 17, an action for goods sold to a bankrupt induced by his false pretenses and fraud is barred by his discharge.—Morse v. Kaufman, Va., 40 S. E. Rep. 916.

24. BANKRUPTCY - Evidence of Insolvency. — The lack of ready money by a merchant to pay a particular debt when due held not evidence of insolvency, under Bankr. Act, § 1, subd. 15. — *In re* Chappel, U. S. D. C., E. D. Va., 113 Fed. Rep. 545.

25. BANKRUPTCY — Georgia Insolvency Law. — The operation of the Georgia insolvency law (Code Ga. 1895, ch. 4, §§ 2716-2722) was suspended by the passage of the bankruptcy act, and proceedings under the former act, are void. Carling v. Seymour Lumber Co., U. S. C. C. of App., Fifth Circuit, 113 Fed. Rep. 483.

26. BANKRUPTCY Knowledge of Purchaser.—Purchasers from an insolvent held chargeable with knowledge of facts which a reasonable inquiry would have revealed.—Gans v. Weinstein, 75 N. Y. Supp. 155.

27. BANKRUPTCY—Release. — A judgment for converting moneys as a factor held released by discharge in bankruptcy.—*In re* Benedict, 75 N. Y. Supp. 165.

28 BANKS AND BANKING—Payment.— Where deposit in savings bank was in name of "D or G" bank held protected on payment to D's executrix. - Grafing v. Irving Sav. Inst., 75 N. Y. Supp. 48.

29. BOUNDARIES — Tide Water. — In the absence of special title, the boundary of a landowner, abutting on the ocean, or any arm thereof where the tide ebbs and flows, extends only to ordinarily high-water mark.—Johnson v. State, Ga. 40 S. E. Rep. 807.

30. BURGLARY - Consent of Occupant.—On a prosecution for burglary, where the owner or occupant of the premises as a witness, his non-consent to the alleged crime must be shown. — Ridge v. State, Tex., 66 S. W. Rep. 774.

31. CARRIERS — Perishable Goods. — A railroad company, chargeable with unreasonable delay in holding a car containing vegetables, is liable for the natural consequences thereof, even beyond its own line.—San Antonio & A. P. Ry. Co. v. Thompson, Tex., 66 S. W. Rep. 792.

32. CARRIERS - Riding on Gratuitous Pass.—One riding on a gratuitous pass, after agreeing to assume all risk of accident, cannot recover for injury from carrier's servants.—Duncan v. Maine Cent. R. Co., U. S. C. C., D. Me., 113 Fed. Rep. 508.

33. CHAMPERTY AND MAINTENANCE — Enforcement. — Though an action may be instituted in pursuance of a champertous contract, it is otherwise meritorious, it will not be dismissed.— Bullock v. Dunbar, Ga., 40 S. E. Rep. 783.

34. CHATTEL MORTGAGE — Conversion of Mortgaged Property.—A mortgagee of personal property converted by third persons may elect to recover the value thereof from the latter, and is not required to enforce his mortgage.— Parlin & Orendorff Co. v. Moore, Tex., 66 S. W. Rep. 798.

35. COLLISION—Inevitable Accident.— The defense of inevitable accident in a suit for collision will not avail a vessel, unless she is shown to have been free from fault. — The Severn, U. S. D. C., E. D. Va., 113 Fed. Rep. 578.

36. CONTEMPT—Advice of Counsel.—Advice of counsel is no defense to a proceeding for contempt of court, although, where the person charged with the contempt is a layman, and not an officer charged with the enforcement of the law, it may be considered in mitigation.— Royal Trust Co. v. Washburn, B. & I. R. Ry. Co., U. S. C. C., S. D. N. Y., 113 Fed. Rep. 531.

37. CONTRACTS—Maintenance for Life.— Third person not a party to a contract for life maintenance, held not entitled to sue thereon, though furnishing the maintenance contemplated.—Erdman v. Upham, 75 N. Y. Supp. 241.

38. CONTRACTS—Substantial Performance.—A contract to decorate walls of room, do the woodwork therein, and furnish it for $5,200 is an entire contract.—Pitcairn v. Philip Hiss Co., U. S. C. C. of App., Third Circuit, 113 Fed. Rep. 492.

39. CORPORATIONS—Notice of President. — Where an organizer of a corporation turned over merchandise, receiving in payment shares of the corporation, his knowledge that he held part of the goods as factor merely did not charge the corporation with notice, though he was its president.—Wyeth v. Renz-Bowles Co., Ky., 66 S. W. Rep. 825.

40. CORPORATIONS—Right to Hold Property.—A foreign corporation, empowered by its charter to acquire and hold real and personal property, may acquire and hold such property in Texas which it has purchased outside the state, though the corporation has no permit to do business in the state, under Rev. St. arts. 745, 746. - Lakeview Land Co. v. San Antonio Traction Co., Tex., 66 S. W. Rep. 766.

41. CORPORATIONS—Stockholders.—The holder of the majority of the stock of a railroad corporation which he does not control is not a tenant in common with the minority stockholders or trustee for them, and, in the absence of actual fraud, may purchase the corporate property at a judicial sale for his own benefit.—Rothchild v. Memphis & C. R. Co., U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 476.

42. COSTS - Death of Accused.—Where one convicted of crime appeals, but dies before his appeal is submitted, neither the sureties on his appeal bond nor his estate are liable for any costs.—Kelly v. State, Tex., 66 S. W. Rep. 774.

43. COSTS—Deed as Mortgage.—Where, in an action to set aside a conveyance as fraudulent, it appeared that the conveyance was a mortgage, but taken in the form of a deed, and the defendants claimed full title, they were not entitled to costs.—Lazarus v. Rosenberg, 75 N. Y. Supp. 11.

44. COSTS - Discontinuance of Action.—Where plaintiff is permitted to discontinue, costs should be awarded only to the defendants opposing the discontinuance.—Bloomingdale v. Luchow, 75 N. Y. Supp. 28.

45. COURTS - Jurisdiction. - A state court has no power to grant a writ of *mandamus* or injunction to prevent a receiver of a federal court, appointed for property over which it had jurisdiction, from carrying out the orders of the court of which he is the officer.—Royal Trust Co. v. Washburn, B. & I. R. Ry. Co., U. S. C. C., W. D. Wis., 113 Fed. Rep. 531.

46. CRIMINAL EVIDENCE — Testimony before Grand Jury. The incompetency of grand jurors to testify as to transactions before them held not a sufficient objection to evidence offered by one accused of gaming to show that he had testified before the grand jury, and was thus under Pen. Code art. 391, exempt from punishment.—Griffin v. State, Tex., 66 S. W. Rep. 782.

47. CRIMINAL LAW—Appeal. The court, on appeal in a criminal case, where there is no bill of exceptions or statement of facts, will not consider a motion for a new trial based on questions relating to the sufficiency and admissibility of the evidence. - Esser v. State, Tex., 66 S. W. Rep. 776.

48. CRIMINAL LAW - Defective Counts. - The court on appeal will not quash an indictment, though containing defective counts, where one count is sufficient and the verdict is general; their being no statement of facts, and no motion to quash having been made *in limine*.—McKinney v. State, Tex., 66 S. W. Rep. 769.

49. CRIMINAL TRIAL Statement of Case. The attorney for the prosecution, in stating his case after reading the indictment, need not state in detail the character of the charge or the evidence to be introduced. - Hinkle v. Commonwealth, Ky., 66 S. W. Rep. 816.

50. CRIMINAL TRIAL - Comparison of Writing. - Where defendant, on trial for forging an indorsement of a note, alleged that the prosecutrix made the indorsement, held error to permit the prosecutrix to sign her name before the jury, and present such signature in connection with signature claimed to be forged.—Whittle v. State, Tex. 66 S. W. Rep. 771.

51. CRIMINAL TRIAL - Description in Transcript. - Code Cr. Proc. art. 411, not requiring the transcript of an indictment to state the nature of the offense charged in the indictment, a misdescription in a transcript of the offense charged in the indictment held not to vitate the indictment.—Roller v. State, Tex., 66 S. W. Rep. 777.

52. CUSTOMS DUTIES - Tennis Balls. — Tennis balls, of which India rubber is the competent material of chief value, held dutiable under Tariff Act, 1897, par. 449. - United States v. Slazenger, U. S. C. C., S. D. N. Y., 113 Fed. Rep. 524.

53. DEBTOR AND CREDITOR - Laches. - Where a creditor has failed, though the debtor has been dead two years, to present his claim, he must, by reason of his laches, be required to look to the proceeds of sale of realty, and not to the property. - Whayne v. Davis, Ky., 66 S. W. Rep. 827.

54. DEEDS - Conditions Subsequent. - Where a grantor conveys property for a school, and has not objected to the school established, he cannot claim a forfeiture after the discontinuance of the school, on the ground that the grantees failed to establish the school required by the condition. - Maddox v. Adair, Tex., 66 S. W. Rep. 811.

55. DEEDS—Construction of Life Estate.—A deed conveying land to grantor's wife for the life of grantor, "and at his death to revert and reinvest in fee-simple to his heirs at law or devisees, should he leave a will," passed only a life estate; the grantor retaining the fee.—Whayne v. Davis, Ky., 66 S. W. Rep. 827.

56. DEEDS—Merchantable Title. - Where no trust is declared in a deed, that the name of the grantees are followed by the description "trustees of" a named person, does not render the title conveyed by them unmerchantable. Kanenbly v. Volkenberg, 75 N. Y. Supp. 8.

57. DEEDS Proper Place of Record. Under Ky. St. § 495, where a deed conveys land lying in two counties, it may be recorded in that county in which the greater part of the land lies, so as to operate as constructive notice of the grantee's title to the entire land. - Shively v Gilpin, Ky., 66 S. W. Rep. 763.

58. DISMISSAL AND NONSUIT Discontinuance.—Where the plaintiff in a libel suit asked to be allowed to discontinue, the trial court cannot require him to stipulate not to sue again as the terms on which the request will be granted. Kilmer v. Evening Herald Co., 75 N. Y. Supp. 243.

59. DISMISSAL AND NONSUIT - Representative Action.—Plaintiff, bringing an action in his own behalf and that of others similarly situated who may join, can, until such a party joins, discontinue or compromise the action. - Manning v. Mercantile Trust Co., 75 N. Y. Supp. 168.

60. DISMISSAL AND NONSUIT - Ruling on Demurrer.—Where demurrer is sustained as to two of three causes of action in the complaint, and plaintiff does not amend, he cannot afterwards dismiss the action, but judgment may be rendered for defendants as to the issues raised. - Goldtree v. Spreckels, Cal., 67 Pac. Rep. 1091.

61. DOWER—Mineral Rights. - A widow, taking a life estate in lands of her deceased husband under the statute of Texas, held entitled to rights in a proportionate share of oil produced from such lands by grantees of the heirs and remainder-men.—Higgins Oil & Fuel Co. v. Snow, U. S. C. C. of App., Fifth Circuit, 113 Fed. Rep. 433.

62. EJECTMENT - Adverse Possession.—In an action to assert title to land by adverse possession, pursuant to Rev. St. 1898, §§ 2865, 2866, judgment cannot be rendered in favor of a right of way based on a use and occupation thereunder, where the finding is adverse to plaintiff as to the title. - Coleman v. Hines, Utah, 67 Pac. Rep. 1122.

63. ELECTIONS Ballots.—Under Pol. Code, § 1205, a ballot whereon a voter has written the name of a candidate under the appropriate office, but across the horizontal line between the title thereof and that of the next office below, or else below such line, is good. - Salcido v. Roberts, Cal., 67 Pac. Rep. 1077.

64. EQUITY - Enforcing Legal Demands.—A court of equity, having acquired jurisdiction over the parties and subject-matter, will grant full relief as between such parties, although it involves in part the enforcement of a contract cognizable at law.—Fidelity Trust & Guaranty Co. v. Fowler Water Co., U. S. C. C., D. Ind., 113 Fed. Rep. 560.

65. EQUITY—Jury.—Use of the jury by the court in an action to quiet title and for injunction held not such an irregularity as would warrant reversal.—Toltee Ranch Co. v. Cook, Utah, 67 Pac. Rep. 1123.

66. ESCAPE—Indictment.—Under Ky. St. § 1338, providing for the punishment of any person who, while lawfully arrested, effects his escape from an officer, an indictment following the language of the statute is sufficient.—Hinkle v. Commonwealth, Ky., 66 S. W. Rep. 816.

67. ESTOPPEL—Ownership.—Defendant held estopped to deny plaintiff's ownership of goods which had been destroyed by fire, where both parties held policies of insurance upon the goods.—Wyeth v. Renz-Bowles Co., Ky., 66 S. W. Rep. 825.

68. EVIDENCE—Accident at Crossing.—The speed at which a train was running is not a question wholly for experts, but may be shown by the testimony of persons

of ordinary experience.—Flanagan v. New York Cent. & H. R. R. Co., 75 N. Y. Supp. 225.

69. EVIDENCE — Common Knowledge.—The question what would have been the result, under circumstances shown, if the driver of a wagon had made a sharp turn for the purpose of avoiding a collision with a buggy, is not one for expert testimony; but the matter is one of common knowledge.—W. J. Lemp Brewing Co. v. Ort, U. S. C. C. of App., Fifth Circuit, 113 Fed. Rep. 482.

70. EVIDENCE — Parol Testimony.—Where plaintiff, in an action on a written contract, introduces evidence of prior conversations between the parties, testimony thereof is admissible on behalf of the defendant.—Sun Printing & Publishing Assn. v. Edwards, U. S. C. C. of App., Second Circuit, 113 Fed. Rep. 445.

71. EVIDENCE — Ship's Log Book.—It is doubtful if the mere inspection of a ship's log book by the adverse party, against whom it is produced and sought to be used, renders it competent evidence for the party who made it.—Worrall v. Davis Coal & Coke Co., U. S. D. C., S. D. N. Y., 113 Fed. Rep. 549.

72. EXECUTION—Limitations.—Under Code Civ. Proc. § 2553, the docketing of surrogates' decrees in the books of the county clerk did not establish a new date for the starting of the five-year limitation, after which section 1377 required notice of an application for execution thereon.—People v. Woodbury, 75 N. Y. Supp. 236.

73. EXECUTION — Mortgaged Personalty.—Personal property in possession of a chattel mortgagee, who is selling it under the mortgage in payment of the debt, held not subject to levy on execution against the mortgagor.—Anderson v. Montgomery County Nat. Bank, Kan., 67 Pac. Rep 1110.

74. EXECUTION—Failure to Offer Separately at Sale.—Where it appears that the smaller of two tracts of farm land sold together if it had been sold separately, would have realized enough to satisfy the execution, it was proper to quash the sale and direct a resale under *venditioni exponas*.—White v. Roberts, Ky., 66 S. W. Rep. 758.

75. EXECUTORS AND ADMINISTRATORS—Compensation.—Where the personal estate distributed by an executor amounted to about $80,000, and only about $15,000 was cash, it was error to restrict the executor to an allowance of 5 per cent. on the latter amount.—Reed v. Reed, Ky., 66 S. W. Rep. 819.

76. EXECUTORS AND ADMINISTRATORS—Value of Services —Where services are rendered and disbursements made under an agreement that the party receiving the benefit shall make compensation by will, and the party dies without a will, the person rendering the services, etc., is entitled to be paid out of the estate.—Leahy v. Campbell, 75 N. Y. Supp. 72.

77. FACTORS AND BROKERS — Burden of Proof.—In an action to recover a real estate commission, in which defendant alleged that the contract was procured through fraud, the burden of proof was on defendant.—Stem v. Whitney, 66 S. W. Rep. 820.

78. FEDERAL COURTS — Following State Decisions.—A federal court, although sitting in equity, may follow the rule of decision of the state courts upon the questions of limitation and laches.—Higgins Oil & Fuel Co. v. Snow, U. S. C. C. of App., Fifth Circuit, 113 Fed. Rep. 433.

79 FIXTURES—Purchaser of Real Estate —The taking of a new lease by a tenant, without reserving the right to remove trade fixtures, held not to defeat the right of the tenant or her chattel mortgagee to remove the fixtures.—Bernheimer v. Adams, 75 N. Y. Supp. 93.

80. FORGERY—Evidence.—On a trial for forgery, held proper to permit evidence that defendant, subsequent to his alleged marriage to the woman whose name was forged, claimed to be illegal, introduced another woman as his wife.—Whittle v. State, Tex., 66 S. W. Rep. 771.

81. FRAUDS, STATUTE OF—Deed Executed Pursuant to Parol Contract.—Where a vendor by parol elects to make a deed, rather than repay the consideration, the deed is not void under the statute of frauds.—McKinley v. McKinley, Ky., 66 S. W. Rep. 831.

82. FRAUDULENT CONVEYANCES—Cancellation.—Where deed to son conveyed 62 acres of land, and execution was levied on 26 acres as debtor's property, it was error, on decreeing the conveyance fraudulent at the instance of the execution creditor, to cancel the whole deed.—Walters v. Cantrell, Tex., 66 S. W. Rep. 790.

83. FRAUDULENT CONVEYANCES — Creditors of Transferee.—Proceeds of property fraudulently transferred, obtained by creditors of the transferee on execution sale, before proceedings by the transferror's creditors to rescind the transfer, cannot be reached by the latter.—Standard Nat. Bank v. Garfield Nat. Bank, 75 N. Y. Supp. 28.

84. FRAUDULENT CONVEYANCES—Husband and Wife.—The act of 1894, regulating the property rights of married women, has not changed the rule which places the burden of proof upon the wife in an action brought against her by her husband's creditor to reach land alleged to have been purchased by the husband and conveyed to her.—Sikking v. Fromm, Ky., 66 S. W. Rep. 760.

85. GAMING—"Crack Loo."—Under Pen. Code, art. 388, a conviction may be had for betting on a game called "crack-loo," played by throwing coin at a crack in the floor.—Donathan v. State, Tex., 66 S. W. Rep. 781.

86. GAMING—Indictment.—An indictment for gaming, charging that defendant unlawfully played "at a game of cards in a public place, to-wit, a gaming house," sufficiently charges the offense.—Griffin v. State, Tex., 66 S. W. Rep. 782.

87. GAMING—Slot Machines.—The running of a nickel-in-the-slot machine, used for distributing cigars and involving the element of chance in its operation, held a violation of Laws 1901, p. 166, § 2.—State v. Woodman, Mont., 67 Pac. Rep. 1118.

88. GUARDIAN—Settlement of Account —Under Code Civ. Proc. § 383, a single action may be maintained against the administrator of the estate of a guardian to settle his account and against the sureties on his guardian's bond for the balance found due.—Zurfluh v. Smith, Cal., 67 Pac. Rep. 1089.

89. HOMICIDE — Assault to Prevent Murder.—Under Pen. Code, art. 676, where homicide is committed to prevent murder, etc., and the weapons used by the aggressor are calculated to accomplish the purpose imputed to him, the legal presumption that he intended to accomplish such purpose should be given in the charge to the jury.—Hall v. State, Tex., 66 S. W. Rep. 783.

90. HUSBAND AND WIFE—Alienation of Husband's Affections.—Parental advice, honestly given a son, must be pleaded in an action by the wife for alienating the son's affections.—Rath v. Rath, Neb., 89 N. W. Rep. 612.

91. HUSBAND AND WIFE — Estoppel to Claim.—A wife cannot charge her husband's executor for chattels which came into his possession without claim of her ownership, when, after selling them, she made no objection to his accounting.—Ives v. Striker, 75 N. Y. Supp. 135.

92. HUSBAND AND WIFE—Liability of Wife on Guaranty.—A married woman held liable on her guaranty of a note owned by her and payable to her order.—Kitchen v. Chapin, Neb., 89 N. W. Rep. 632.

93. HUSBAND AND WIFE Presumption.—Where a husband placed the title to lands in his wife without consideration, a gift is presumed.—Doane v. Dunham, Neb., 89 N. W. Rep. 640.

94. HUSBAND AND WIFE—Wife as Surety.—Though husband and wife signed a note jointly, the word "principal" appearing after the wife's name, held the wife was surety merely, and was therefore not bound.—Postell v. Crumbaugh, Ky., 66 S. W. Rep. 830.

95. HUSBAND AND WIFE—Wife's Separate Property.—A judgment against a husband and wife may be satisfied out of the wife's separate property, though it does not specifically direct that execution may issue against her property.—Walters v. Cantrell, Tex., 66 S. W. Rep. 790.

96. INDICTMENT—Failure to Allege Date.—An indictment which fails to allege the date of the commission of

the offense charged is fatally defective.—Vallegas v. State, Tex., 66 S. W. Rep. 769.

97. INDICTMENT AND INFORMATION — Motion to Quash. —The question that no preliminary examination was had cannot be raised by motion to quash, but by plea in abatement.—State v. Sunnafrank, Kan., 67 Pac. Rep. 1103.

98. INFANTS - Estoppel.—An estoppel does not arise where the person sought to be estopped knew all of the facts.—Mathers v. Mathers, Ky., 66 S. W. Rep. 833.

99. INJUNCTION - Restraining Transfer.—The United States is not entitled to a restraining order from a court of equity, in a suit to set off cross judgments, to prevent the defendant from transferring his judgment, since no transfer could be made which would prejudice its rights.—Teller v. United States, U. S. C. C. of App., Eighth Circuit, 113 Fed. Rep. 463.

100. INSURANCE - Suspension of Policy.—Where a note is taken for insurance premium, and it and the policy provide that on default the policy shall be suspended while it remains unpaid, the insurance company is not liable for a loss after maturity of the note while the same is unpaid.—Houston v. Farmers' & Merchants' Ins. Co , Neb., 89 N. W. Rep. 635.

101. INTOXICATING LIQUORS — Illegal Sales.—In an action to recover the penalty of a liquor license bond for sale of liquors in the basement under the barroom on Sunday, held error to exclude testimony as to the basement being in possession of a subtenant of the licensee. —Cullinan v. Furtheman, 75 N. Y. Supp. 90.

102. INTOXICATING LIQUORS—Pretense of Selling by Wholesale.—Under an indictment for selling liquor in quantities less than five gallons, the court properly in structed to find defendant guilty if he "pretended to sell the witness ten gallons and let him have it by the small."—Griffin v. Commonwealth, Ky., 66 S. W. Rep. 817.

103. INTOXICATING LIQUORS - Sale to Students.—Rev. St. art. 5060g, authorizes a recovery from a saloon keeper selling liquors to a student, though the saloon keeper or his employees have no knowledge that the purchaser is a student.—Peacock v. Limburger, Tex., 66 S. W. Rep. 764.

104. JUDGMENT — Absence from Trial. Plaintiffs held not entitled to have a judgment against them vacated on the ground that neither they nor their authorized attorneys were present at the trial.—Brashears v. Dickinson, Ky., 66 S. W. Rep. 816.

105. JUDGMENT—Death of One Defendant.—A default judgment, rendered by a circuit court in favor of the commonwealth against the principal and sureties on the bond of a clerk, held not void as to the sureties, though the principal was dead at the time.—Asher v. Commonwealth, Ky., 66 S. W. Rep. 759.

106. JUDGMENT— Persons Concluded — A widow, entitled under the laws of Texas to a life estate in one-third of real estate owned by her deceased husband, held not bound by a compromise judgment entered in an action by her children and other co-tenants in the land against an adverse claimant to which action she was not a party.—Higgins Oil & Fuel Co. v. Snow, U. S. C. C. of App., Fifth Circuit, 113 Fed. Rep. 433.

107. JUDGMENT — Revivor of Dormant Judgment. — Where a dormant judgment is revived, it operates as a lien only on the real estate which the judgment debtor owns at the time of the revivor. — Halmes v. Dovey, Neb., 89 N. W. Rep. 631.

108. JUDGMENT LIEN - Priorities.— General judgment creditors held to acquire no prior lien over judgments on foreclosure for failure to enforce such judgments in one year after rendition. — Jackson v. King, Kan., 67 Pac Rep. 1112.

109 JUDICIAL SALES — Relief of Purchaser. — Under Laws 1889, ch. 167, § 1, a purchaser at a referee's sale held not entitled to be relieved on the ground that the sale was without consent of infant defendants.—Sproule v. Davies, 75 N. Y. Supp. 229.

110. JURY—Relationship Between Juror and Prosecuting Witness.—The relationship between a juror and a prosecuting witness held not sufficient to disqualify the former. — Doyle v. Commonwealth, Va , 40 S. E. Rep. 925.

111. JUSTICES OF THE PEACE—Demand of New Trial.— Where defendant, on appeal from justice to county court, also asks for a new trial, the appeal will not be dismissed because a new trial could not be granted.— Harding v. Pratt, 75 N. Y. Supp. 247.

112 JUSTICES OF THE PEACE— Jurisdiction. — Under Hill's Ann. Laws, § 908, a justice of the peace has no jurisdiction of an action to recover personal property, alleged in a petition to be worth $249, and $25 damages for detention; and his judgment is not rendered valid by a remission of the claim for damages after judgment has been entered for the return of the property. — Ferguson v. Byers, Oreg., 67 Pac. Rep. 1115.

113. LIFE ESTATES—Right to Sue.—A person owning a life interest in land can bring a suit to try title and for partition thereof.—Skaggs v. Deskin, Tex., 66 S. W. Rep. 793.

114. LIFE INSURANCE—Fraud Waived.—Fraud in furnishing a life policy different from that contracted for held waived, and policy accepted; the policy not having been examined and the facts learned till months after its delivery.—Bostwick v. Mutual Life Ins. Co , Wis., 89 N W. Rep. 538.

115. LIFE INSURANCE - Insolvent.— Under Laws 1858, ch 187, as amended by Laws 1870, ch. 227, and Laws, 1896, ch. 272, § 22, where an insolvent pays more than $500 annually for insurance on his life, payable to his wife, his estate or creditors are entitled to the amount of insurance purchased with such excess, and no more. —Kittel v. Domeyer, 75 N. Y. Supp 150.

116. LIFE INSURANCE - Medical Examiner. —Fact that physician making medical examination of applicant for life policy knew the statements made were false held not to affect the company's right to obtain its cancellation.—John Hancock Mut. Life Ins. Co. v. Houpt, U. S. C. C., W. D. Pa., 113 Fed. Rep. 572.

117. LIMITATION OF ACTIONS — Absence from State.— Where surety on note does not pay it until maker becomes resident in another state, limitations will not be suspended by reason of the latter's absence from the state.—Habermann v. Heidrich, Tex., 66 S. W. Rep. 795.

118. LIMITATION OF ACTIONS - Accounting by Guardian —Proceedings by infant, after coming of age, instituted soon after learning that the guardian had received money, for accounting, held not barred; the guardian having done nothing in repudiation of the guardianship—*In re* Sack, 75 N. Y. Supp. 120.

119. LIMITATION OF ACTIONS — Payment by Will. - Where there is an unrepudiated contract to pay for services by will, a breach thereof occurs when the person dies without making the will, and limitation on a recovery for such services runs from that time.—Leahy v. Campbell, 75 N. Y. Supp. 72.

120. LIMITATION OF ACTIONS — Summous Issued in Blank.—Under Rev. St. 1898, §§ 3594, 4240, delivery to an officer for service of a summons signed by the justice in blank and filled in by an attorney, on the last day of limitation, does not avoid the bar of the statute. — Johnson v. Turnell, Wis., 89 N. W. Rep. 515.

121. LOST INSTRUMENTS - Pleading.—In an action on a lost instrument, it is not necessary to allege the manner in which it was lost. — Storey v. Kerr, Neb., 89 N. W. Rep. 601.

122. MALICIOUS PROSECUTION— Evidence. — In an action for malicious prosecution, previous good conduct of plaintiff is inadmissible on the question of probable cause.—Bank of Miller v. Richmon, Neb., 89 N. W. Rep. 627.

123 MALICIOUS PROSECUTION—Probable Cause.- In an action for malicious prosecution, where the declaration sets out fully the affidavit, warrant, andrecords of the alleged malicious suit, the defense of probable cause is

admissible under the general issue. — Steadman v. Keets, Mich., 89 N. W. Rep. 555.

124. MANDAMUS—Execution. — A surrogate acted judiciously in requiring that an adverse party be given notice of an application for execution, and his action could not be reviewed by *mandamus*. — People v. Woodbury, 75 N. Y. Supp. 236.

125. MANDAMUS — Public Officers. — Where public officers at the expiration of their term refuse to deliver property pertaining to the office to their successors, *mandamus* will lie to compel such delivery, though in determining its possession the title to the office is incidentally questioned.—Sinclair v. Young, Va, 40 S. E. Rep. 907.

126. MANDAMUS — School Trustee.— *Mandamus* is the proper remedy to compel a school trustee to issue an order for the payment of a bill which has been duly allowed, and for which a tax has been levied and collected.—People v. Anderson, 75 N. Y. Supp. 240.

127. MARITIME LIENS—Supplies - A contract between a vessel owner and a dealer to supply coal to the former's vessels during the season held not to give the dealer a lien on the vessels therefor. — Cuddy v. Clement, U. S. C. C. of App., First Circuit, 113 Fed. Rep. 454.

128. MARSHALING ASSETS AND SECURITIES—Parties. — Objections that senior mortgagee of real and personal property should have been compelled to enforce mortgage against the real estate before being allowed to recover against person converting the personalty held untenable —Parlin & Orendorff Co. v. Moore, Tex, 66 S. W. Rep 798.

129. MASTER AND SERVANT—Contract of Employment. —A contract of employment held to imply an undertaking that plaintiff was competent to discharge the duties which he contracted to perform —Sun Printing & Publishing Assn. v. Edwards, U. S. C. C. of App., Second Circuit, 113 Fed. Rep. 445.

130 MASTER AND SERVANT - Contributory Negligence. — Car inspector, going between two cars without observing company's rules, held guilty of contributory negligence. — Devoe v. New York Cent. & H. R. R. Co., 75 N. Y. Supp. 136.

131. MASTER AND SERVANT - Dangerous Machinery. — Master was not liable for injury to servant, though it had failed to instruct him how to use a machine, and had assured him there was no danger, where plaintiff had represented that he understood how to operate the machine and the danger was obvious. — McCormick Harvesting Mach. Co. v. Litar, Ky., 66 S. W. Rep. 761.

132. MASTER AND SERVANT — Dangerous Premises.— The promise of a master to repair within a specified time defective machinery held not to relieve the servant from the assumption of the risks of the employment before the time the master agreed to repair.—Rice v. Eureka Paper Co., 75 N. Y. Supp 49.

133. MASTER AND SERVANT - Negligence.—Trolley car company held negligent for constructing its tracts so close together for a few feet that there was not room for a conductor on the running board between passing cars, and not warning him of the danger. — True v. Niagara Gorge R. Co., 75 N. Y. Supp. 216.

134. MECHANICS' LIENS — Subcontractor. — Under Ky. St. § 2467, where the owner owed the principal contractor when the subcontractor's notice for lien was served, but afterwards resumed possession of the property because of the contractor's delay, and used the amount he owed the contractor in finishing the work, the subcontractor had no lien.—Watts v. Metcalf, Ky., 66 S. W. Rep. 824.

135. MORTGAGES Amendment of Decree.—A decree of foreclosure is not final, so far as relates to the provisions therein for its own enforcement, directing the manner in which the mortgaged property shall be sold, etc, and in such respects it may be amended at any subsequent term. - Royal Trust Co. v. Washburn B. & I. R. Ry. Co., U. S. C. C, S. D. N. Y, 113 Fed. Rep. 531.

136. MORTGAGES—Assignment.—Where the indorser of a note, who was compelled to pay it, took an absolute conveyance of property, instead of a mortgage as security, his transference of the property to one who assumed the indorser's liability was a valid assignment of the lien though the indorser did not transfer the note which he had taken up. — Lazarus v. Rosenberg, 75 N. Y. Supp. 11.

137. MORTGAGES -Lien for Attorney's Fees.—A lien for attorney's fees reserved in a purchase money note secured by trust deed cannot be asserted against subsequent purchasers, where the deed did not refer to the provision in the note as to attorney fees, and such purchasers did not otherwise have notice of the lien.—Hall v. Read, Tex., 66 S. W. Rep. 809.

138. MUNICIPAL CORPORATIONS — Grants — How Construed.—City ordinances conferring grants are to be construed liberally in favor of the public.—Traverse City Gas Co. v. City of Traverse City, Mich., 89 N. W. Rep. 574.

139. MUNICIPAL CORPORATIONS - Milk Peddlers.— Under an ordinance merely penalizing any vendor of milk falsely holding himself out as having taken out a certificate, a vendor who had no certificate, and denied that he could be compelled to secure one, was not liable.—City of Gloversville v. Enos, 75N. Y. Supp. 245.

140. MUNICIPAL CORPORATIONS - Repairing Sidewalk - Negligence.—Evidence of repairs to a sidewalk after plaintiff has been injured is not admissible, in an action against the city for an injury, as substantive evidence of the negligence of the city. Zibbell v. City of Grand Rapids, Mich., 89 N. W. Rep. 563.

141. MUNICIPAL CORPORATIONS - Validity of Contract.— Contract of city held not illegal by the fact that its proposed bid embodied statutory provisions that existed, but since held unconstitutional.—Knowles v. City of New York, 75 N. Y. Supp. 189.

142. NEGLIGENCE - Contributory Negligence. - Though the negligence of a driver, resulting in a crossing accident, cannot be imputed to a person accepting an invitation to ride, without having any control of the horse, such person is not relieved from the duty of acting for himself in a reasonably careful and prudent manner. Flanagan v. New York Cent. & H. R. R. Co., 75 N. Y. Supp. 225.

143. NEW TRIAL — Excessive Damages. — Where the damages awarded in an action on a contract are substantially in excess of the amount justified by the evidence, the court will award a new trial, though it is claimed the motion for new trial did not request the setting aside of the verdict on that ground.—Rowland Lumber Co. v. Ross, Va., 40 S. E. Rep. 922.

144. NEW TRIAL - Time of Filing Motion.—A motion for new trial must in all cases, except for newly-discovered evidence, be filed at the term at which the decision was rendered. Harris v. Jennings, Neb., 89 N. W. Rep. 625.

145. OFFICERS—Action by Individual.—An individual has no right of action against a public officer for breach of a public duty.—School Dist. No. 80 of Nemaha County v. Burress, Neb., 89 N. W. Rep. 609.

146. PARTIES - Representative Action.—Where plaintiff, bringing an action for himself and others similarly situated, delays the prosecution, a person joining the action may prosecute it, on giving bond securing payment of *pro rata* expenses. — Manning v. Mercantile Trust Co., 75 N. Y. Supp. 168.

147. PARTNERSHIP—Firm Assets.—In an action by a creditor of a firm, the amount due by one partner of the firm for his admission is a firm asset, and cannot be ordered paid into court.—Huffman v. Huffman, S. Car., 40 S. E. Rep. 963.

148. PARTNERSHIP - Firm Assets.—Where one deceased contracted a debt under a firm name, a bank account carried by deceased in such firm name should be applied to the debt of the firm creditor, as against individual creditors and the administratrix.—United Nat Bank v. Weatherby, 75 N. Y. Supp. 3.

149. PILOTS—Regulations.—A pilot without a license held not entitled to fees for bringing a vessel into port.—State v. Commissioners of Pilotage, S. Car., 40 S. E. Rep. 959.

150. PLEADING — Counterclaim. — Counterclaim in an action of tort held sufficiently pleaded, under Rev. St. 1898, § 2656, requiring that a counterclaim must be pleaded as such and be so denominated.—Rylander v. Laursen, Wis., 89 N. W. Rep. 488.

151. PLEADING - Instructions.—Where a faulty answer is treated as sufficient during the trial, the court should refuse to instruct, at plaintiff's request, that certain facts in the petition were not denied in the answer.—Albion Milling Co. v. First Nat. Bank, Neb., 89 N. W. Rep. 638.

152. PLEADING—Personal Injury.—Plaintiff, in an action for personal injuries not alleged to be permanent, held not required to give bill of particulars thereof, with their nature, location, and probable duration.—English v. Westchester Electric R. Co., 75 N. Y. Supp. 45.

153. PLEADING—Replevin.—In an action on a replevin bond, matters in excuse of breach of the bond must be specially pleaded.—Smith v. Bowers, Neb., 89 N. W. Rep. 596.

154. PRINCIPAL AND AGENT—Authority of Agent.—The architect, being the owner's agent merely to see that his contract was performed, could not bind the owner by a contract to pay the subcontractor.—Watts v. Metcalf, Ky., 66 S. W. Rep. 824.

155. PRINCIPAL AND AGENT — Oral Modifications. — A company, sued for work performed under a contract, held not estopped to deny an agent's authority to execute a verbal contract modifying an original written contract.—Rowland Lumber Co. v. Ross, Va., 40 S. E. Rep. 922.

156. PRINCIPAL AND SURETY—Release.—An extension of the time of payment by agreement between creditor and debtor, based on a consideration, held to release the guarantor.—Rushton v. Dierks Lumber Co., Neb., 89 N. W. Rep. 616.

157. PRINCIPAL AND SURETY—Rights of Surety After Payment.—Surety on liquor license bond, having paid penalty for breach, held entitled to recover from undisclosed principal.—City Trust, Safe Deposit & Surety Co. v. American Brewing Co., 75 N. W. Supp. 140.

158. PROCESS Service of Summons.—Where there is no service of summons, the court cannot acquire jurisdiction in a personal action, unless it is waived.—Wren v. Johnson, S. Car., 40 S. E. Rep. 937.

159. RAILROADS - Fear Inducing Act.—Where one engaged in unloading a car on a side track jumps from it and is injured, through fear that he would be struck by other cars coming down grade, held, the company was not relieved from liability by showing that there was no necessity for him to jump.—Gulf, C. & S. F. Ry. Co. v. Bryant, Tex., 66 S. W. Rep. 804.

160. RAILROADS — Frightening Animals. — In action against railroad company for personal injuries caused by frightening decedent's mule, evidence as to whether unnecessary noise was made held to support verdict against company. — Texas & P. Ry. Co. v. Hamilton, Tex., 66 S. W. Rep. 797.

161. RAILROADS—Mandamus. — *Mandamus* to compel a railroad company to do a particular act in constructing its road or in running its trains can be issued only when there is a specific legal duty to do the act and clear proof of a breach of such duty.—People v. Brooklyn Heights R. Co., 75 N. Y. Supp. 202.

162. RAILROADS — Negligence.—A railway company is liable for injuries sustained by persons lawfully on its tracks by reason of negligence in their construction.—Gulf, C. & S. F. Ry. Co. v. Bryant, Tex., 66 S. W. Rep. 804.

163. RECEIVERS — Evidence. — In an action by a receiver, plaintiff must prove authority from the court to prosecute the suit.—Darner v. Gatewood, Neb., 89 N. W. Rep. 603.

164. RECORDS—Amending Record.—In deciding a motion for a *nunc pro tunc* order to amend the record, the court may act upon any satisfactory competent evidence.—Harris v. Jennings, Neb., 89 N. W. Rep. 625.

165. REFERENCE — Delivery of Report. — Though the report of a referee is filed or delivered more than the 60 days after the case is submitted during which the referee is required to file his report by Code Civ. Proc. § 1019, the report is effective against the party who had not sought to terminate the reference. — Agricultural Ins. Co. v. Darrow, 75 N. Y. Supp. 128.

166. REFERENCE—Discretion of Court.—Refusal to recommit report of referee, or to revoke the order of reference, held addressed to the discretion of the court.—Halk v. Stoddard, S. Car., 40 S. E. Rep. 957.

167. REFORMATION OF INSTRUMENTS — Mistake. — A written contract will not be reformed for an alleged mutual mistake, unless the evidence is of the most substantial character.—Kelley v. Root, 75 N. Y. Supp. 163.

168. REPLEVIN — Right of Mortgagee. — A mortgagee cannot maintain replevin for possession of property removed from the mortgaged premises.—Moor v. Moran, Neb., 89 N. W. Rep. 629.

169. SALES - Damages. — A party having contracted to deliver lumber within a specified time, and failed so to do, held liable for the buyer's loss of profits on a resale, and the amount the latter paid his vendee in settlement for failing to furnish the lumber as agreed. — Perry Tie & Lumber Co. v. Rennolds, Va., 40 S. E. Rep. 919.

170. SALVAGE Costs of Excessive Bond. — On a libel for salvage, the requirement of an excessive bond from claimant should not be permitted to relieve him from costs, where the amount appeared to have agreed on, and the claimant had had an opportunity to apply to the judge for a reduction. — The Barge No. 127, U. S. D. C., D. R. I., 113 Fed. Rep. 529.

171. SEAMEN—Right to Wages.— Seamen cannot recover wages, where by reason of their gross and culpable neglect of duty the vessel in their charge has sustained damages exceeding the amount of such wages.—The Jundeau, U. S. D. C., D. Wash., 113 Fed. Rep. 514.

172. SHERIFFS — Forcible Entry into Dwelling. — An officer, having in his hands an order for the sale of specific property, held not entitled to effect a forcible entry into the dwelling of the defendant for the purpose of seizing it. — Hillman v. Edwards, Tex., 66 S. W. Rep. 788.

173. SHERIFFS AND CONSTABLES—Failure to Levy Execution.—Where the defendant in an execution had sufficient property to satisfy the execution when the writ was placed in the hands of the sheriff, and he failed to return the execution until after return day and until the defendant had died insolvent, he is liable on his bond.—Commonwealth v. Begley, Ky., 66 S. W. Rep. 754.

174. SPECIFIC PERFORMANCE—Consideration Paid by Another.—A grantee in a deed, where part of the consideration was furnished by another and both entered into possession as tenants in common, held a trustee for the party furnishing the consideration, which equity is not prohibited from enforcing by Laws 1896, ch. 547, §§ 74, 234.—Quinn v. Quinn, 75 N. Y. Supp. 83.

175. STREET RAILROADS—Piling Snow on Crossing.—In an action against a street railway company for injuries from the piling of snow on a crosswalk by defendant, a contention that the street along which plaintiff was traveling was not a public highway held of no avail to defendant.—Newport News & O. P. Ry. & Electric Co. v. Bradford, Va., 40 S. E. Rep. 900.

176. STREET RAILROADS—Right to Occupy Public Highways.—Acts 1889-90, p. 26, and Acts 1893-94, do not confer the right to operate upon the highways a street railroad for the transportation of passengers without first acquiring the right by purchase of condemnation. — Norfolk Railway & Light Co. v. Consolidated Turnpike Co., Va., 40 S. E. Rep. 897.

177. SUBROGATION—Leasehold.—On the mortgagee of

a leasehold paying rent and taxes on default of the assignee of the lessor, he is subrogated to the lessor's rights against the assignee.— Dunlop v. James, 75 N. Y. Supp. 65.

178. TAXATION — Transfer Tax. — Bonds secured by mortgage on real estate in the state, and kept by non-resident at her home, held not subject to the transfer tax.—*In re* Preston's Estate, 75 N. Y. Supp. 251.

179. TAX SALES—Limitations.— Two years' limitation to recover land sold for taxes does not run until purchaser is put in possession.—Gardner v. Reedy, S. Car., 40 S. E. Rep. 947.

180. TENANCY IN COMMON - Adverse Possession.— Occupancy of realty by a son (inheriting his mother's community interest), payment of taxes, and making improvements held not sufficient to show an ouster of his co-tenant.—Madison v. Matthews, Tex., 66 S. W. Rep. 803.

181. TRADE-MARK AND TRADE-NAME — Disassociation from Article. — A trade-mark cannot be transferred, separated from the article to which it has been applied, so as to give the transferee the right to protection in its use in connection with a different article or one of a different manufacture. — Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co., U. S. C. C. of App., Eighth Circuit, 113 Fed. Rep 468.

182. TRESPASS—Cutting Timber. — In trespass for cutting timber, evidence that defendant acted in good faith and with the knowledge and consent of plaintiff is improperly rejected. — Smith v. Morse, 75 N. Y. Supp. 126.

183. TRESPASS - Right to Enter Premises.— The act of defendant corporation in entering upon the premises of plaintiff's husband to remove a clock, which it had sold him, held not a trespass; the condition upon which it was to have the right to enter having happened.— C. F. Adams Co. v. Sanders, Ky., 66 S. W. Rep. 815.

184. TRIAL - Damages.— In an action for assault, an instruction authorizing compensatory and punitive damages held not prejudicial because it failed to tell the jury that it could award punitive damages only if the assault was made willfully and maliciously, where stated elsewhere in charge. — Hollins v. Gorhan, Ky., 66 S. W. Rep. 823.

185. TRIAL Directed Verdict.—The right of a defendant to have all the issues of fact submitted to the jury is not waived by his motion to direct a verdict, unless the plaintiff also asks a direct verdict — Wilson v. Commercial Union Ins. Co., S. Dak., 89 N. W. Rep. 649.

186. TRIAL—Instructions.—In an action by a passenger for personal injuries sustained while alighting from street car, an instruction assuming the purpose for which the car slowed down held erroneous. - Rapid Transit Ry. Co. Co. v. Lusk, Tex., 66 S. W. Rep. 799.

187. TRIAL - Partnership.—The purpose of a competent and material question, in an action by the assignee of a firm debt, held so plainly manifest that error in excluding it might be reviewed, though there was no offer of proof.—Chambers v. Webster, 75 N. Y. Supp. 31.

188. TRIAL—Reading Law to Jurors.—It was not error to refuse to permit counsel to read to the jury a definition of "reasonable time," and to read decision on the question as to what constitutes contributory negligence. —Newport News & O. P. Ry. & Electric Co. v. Bradford, Va., 40 S. E. Rep 900.

189. TRIAL — Weight of Evidence.— There being some evidence in support of plaintiff's claim, whether the weight of evidence is with defendant is for the jury.— Fay v. Brooklyn Heights R. Co., 75 N. Y. Supp. 113.

190. TRUSTS - Authority to Sell - Under Civ. Code Prac. § 498, where lands are held in trust for the life of one, with remainder over to a class of persons not ascertained or to be ascertained until the death of the life tenant, the circuit court may empower the trustee to sell, provided it is shown that the sale will be beneficial to all concerned —Burge v. Fidelity Trust & Safety Vault Co., Ky., 66 S. W. Rep. 752.

191. TRUSTS - Bank Account.—A decedent's bank account held impressed with a trust in favor of those whose funds he had deposited therein.—United Nat. Bank v. Weatherby, 75 N. Y. Supp. 3.

192. TRUSTS Parol Evidence.—Parol evidence to establish a resulting trust, where a husband has placed title to land in his wife without consideration, must be clear, unequivocal, and convincing.—Doane v. Dunham, Neb., 89 N. W. Rep. 640.

193. TRUSTS — Revocation.—Where defendant's testatrix deposited money in a savings bank, receiving a pass book headed with her name "in trust for" a grandson by name, she thereby created an irrevocable trust, and her estate is chargeable with so much of such money as was withdrawn by her, with interest thereon. —Robinson v. Appleby, 74 N. Y. Supp. 1.

194. TURNPIKES AND TOLL ROADS — Change of Grade. — Village changing grade of turnpike without notice to turnpike company held liable to such company for resulting damage.—Fayetteville & S. R. & Turnpike Co. v. Village of Fayetteville, 75 N. Y. Supp. 180.

195. USURY — Limitations.- Time of occurrence of usurious transaction, within Rev. St. U. S. § 5198, authorizing action against national bank, taking usury, within two years from time the usurious transaction occurred, considered, where note is discounted and where it is renewed.—Smith v. First Nat. Bank, 75 N. Y. Supp. 131.

196. VENDOR AND PURCHASER—Fixture —A *bona fide* purchaser of real estate, on which is situated a residence apparently a part of the freehold, will take title to the land, including the building —Moore v. Moran, Neb., 89 N. W. Rep. 629.

197. VENDOR AND PURCHASER - Rescission of Contract. —An action by a grantee to rescind a contract may be maintained at law.—Loudon v. Carroll, Mich., 89 N. W. Rep. 578.

198. VENDOR AND PURCHASER—Sale of Land.—The existence of a party wall agreement and a stoop projecting into the street do not constitute defects in the title to premises consisting of a city lot and improvements thereon, nor authorize the rescission of a contract to purchase such premises. - Levy v. Hill, 75 N. Y. Supp. 19.

199. WEAPONS—Intention.—One who removed the cylinder rod of a pistol, and, believing that the pistol was thus rendered incapable of shooting, carried it about with him trying to sell it, was not guilty of unlawfully carrying a pistol, although it appeared that the pistol could be made to shoot by placing the cylinder with the hands.—White v. State, Tex., 66 S. W. Rep. 773.

200. WILLS—Legacies to Slaves.—The fact that legacies given to slaves may have been given to enable them to remove from the state, in order that they might be free, and that at the death of testator's widow, when the testamentary emancipation took place, the legacies were no longer necessary for that purpose, held not to cause them to fail; there being nothing in the will to manifest any such purpose.—Miller v. Wilson's Admr., Ky., 66 S. W. Rep. 755.

201. WILLS—Partition.—In partition of real estate and the proceeds of investments illegally made by a life tenant, the court will construe the will and direct distribution of the moneys.—Kaiser v. Adami, 75 N. Y. Supp. 195.

202. WITNESSES—Admissibility of Evidence.—A person injured by a defective sidewalk, who appears before the city council and is examined, and her testimony taken in writing, may be interrogated by the city, in an action against it for injuries in reference to statements so made, without introducing the entire testimony so taken.—Zibbell v. City of Grand Rapids, Mich., 89 N. W. Rep. 563.

203. WITNESSES — Physicians.—Under Rev. St. 1898, § 4075, where plaintiff was injured because of a defective highway, the physician who attended her thereafter should not be permitted to testify, over her objections, to her physical condition, though she has testified to her condition during the time she was treated by him.— Green v. Town of Nebagamain, Wis., 89 N. W. Rep. 529